J.J. Cassone Bakery, Inc. *and* Bakery, Confectionary Tobacco Workers' Union, Local *and* Cabrilio Flores *and* Lorenzo Macua. Cases 2–CA–32559, 2–CA–32778, 2–CA–32941, 2–CA–33144, 2–CA–33267, and 2–RC–22152

June 26, 2007

SUPPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 22, 2006, Administrative Law Judge Steven Davis issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below, and to adopt the recommended Order as modified.[3]

Overview

The issues presented in this case concern the Respondent's conduct during a union organizing effort at its facility. The judge found that the Respondent committed various violations of Section 8(a)(1) and (3), many of which occurred during the critical period before the December 21, 1999[4] representation election, thus constituting objectionable conduct. For the reasons stated in his decision, we agree with the judge's findings that the Respondent violated the Act by discriminatorily suspending four employees, discriminatorily terminating four employees, and by making several unlawful statements, including threats, promises of benefits, and two interrogations.[5] We also affirm his conclusion that these unfair labor practices warrant setting aside the election.[6] As explained below, however, we reverse the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Adan Aguilar.

Facts

On December 15, employee Marcelino Cortes informed fellow employee Aurelio Viegas that Adan Aguilar and Cesar Calderon, both of whom were active members of the Union's organizing committee, had threatened him earlier that day. Viegas relayed this information to Rocky Cassone, one of the Respondent's owners, who then spoke to Cortes to verify Viegas' account. Cortes reported the following to Cassone.[7] Cortes was a member of the Union's organizing committee, but, along with some other employees, had decided to cease participating. These employees scheduled for 3 a.m. on December 15[8] a meeting with Calderon to inform him that they did not want to continue as members of the committee. Cortes initially expected that Calderon would pick him up after he got off work. Cortes waited a few minutes, but

[1] On January 31, 2002, Administrative Law Judge Howard Edelman issued a decision in this matter. Pursuant to the Respondent's exception that Judge Edelman had improperly copied into his decision extensive portions of the General Counsel's and Charging Party Union's posthearing briefs, the Board remanded the case to the Chief Administrative Law Judge for reassignment. *J.J. Cassone Bakery*, 345 NLRB No. 111 (2005). The Chief Administrative Law Judge subsequently assigned the case to Judge Davis.

[2] In his decision, Judge Davis relied on the demeanor-based credibility determinations Judge Edelman made in his January 31, 2002 decision, finding them to be "completely consistent with the weight of the evidence." Judge Davis also made his own credibility determinations "based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." The Respondent has excepted to some of Judge Davis' credibility findings, including the demeanor-based findings he adopted from Judge Edelman's decision. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We find merit in the General Counsel's exception that employee Robert Lostaunau not be included in the reinstatement provision of the recommended Order, as the evidence shows that he resumed employment following his unlawful suspension.

[4] All dates are 1999, unless otherwise indicated.

[5] We find it unnecessary to consider whether the Respondent violated Sec. 8(a)(1) by interrogating employee Cesar Calderon, as found by the judge, as this allegation is cumulative of other interrogation violations found by the judge, which we have affirmed.

In adopting the judge's findings with respect to these 8(a)(1) violations, Member Schaumber notes that the Respondent excepted to the judge's decision to credit testimony demonstrating that the statements were made, and not to the judge's legal determinations that these statements were unlawful. See *Dairyland USA Corp.*, 347 NLRB No. 30, slip op. at 2 fn. 7 (2006).

Further, Member Schaumber agrees with his colleagues and the judge that the statements of leadmen Jon Cassone, Aurelio Viegas, and Guillermo Serra are attributable to the Respondent because these men were the Respondent's agents. In reaching this conclusion, Member Schaumber agrees that it is reasonable to infer that the Respondent's September "Do's and Don'ts" memorandum, which specifically instructed recipients to risk being "overzealous" in their opposition to the Union, was distributed to the leadmen. Accordingly, when these leadmen acted consistent with that instruction, their conduct was attributable to the Respondent. Member Schaumber finds it unnecessary to rely on the remainder of the judge's agency analysis.

[6] Accordingly, it is unnecessary to pass on the judge's findings with respect to the Union's objections.

[7] At the hearing, Judge Edelman refused to consider and to weigh testimony about what occurred between Cortes, Aguilar, and Calderon on the morning of December 15. Instead, he only allowed testimony about what Cortes reported to Cassone to have happened that morning. Accordingly, the following facts come from Cortes' testimony about what he reported to Cassone, and from Cassone's testimony about what Cortes reported to him, during their three or four conversations about the incident.

[8] These employees' worked a 3 p.m. to 3 a.m. schedule.

then walked the short distance home after Calderon did not appear. As Cortes neared his apartment building, Calderon and Aguilar signaled to him from a parked van, and asked him to get in. Once he did, a heated exchange occurred between Cortes and Calderon, wherein Calderon repeatedly accused Cortes of convincing other employees to quit the committee. Cortes denied having caused others to change their minds, at which point Aguilar started "really threatening" Cortes. Cortes told Cassone that Aguilar "threatened to break his bones and stab him with knives if he wouldn't continue with this, and that they would go after his family if they didn't continue with this."[9]

After reporting this incident to Cassone, Cortes asked him what he should do. Cassone suggested that Cortes file a police report, but Cortes told Cassone that he was not ready to go to the police. By December 16, Cortes had changed his mind, and he asked Cassone to accompany him to the police station. Cassone did so, and Cortes filed a complaint with the police. On December 18, Cassone saw Aguilar and Calderon in the parking lot outside the Respondent's facility. Assuming that there were warrants for their arrests, Cassone called the police, who came and arrested Aguilar and Calderon, charging them both with menacing in the third degree. On December 19, based on that criminal charge and as a condition for his release on bail, an order of protection was issued against Aguilar requiring Aguilar to stay away from Cortes, his home, and his place of employment, and to refrain from threatening Cortes and all members of his household.[10]

Based on this incident, Cassone decided to terminate Aguilar's employment. On December 20, the Respondent gave Aguilar a letter informing him of his discharge. In considering whether to impose discipline on Aguilar, Cassone did not interview either Aguilar or Calderon. Cassone testified that he did not believe that either would tell the truth, and that he also could not contact Calderon because he was no longer an employee.

Analysis

We find merit in the Respondent's exceptions to the judge's finding that the discharge of Aguilar violated Section 8(a)(3) and (1) of the Act. Specifically, we conclude that the Respondent has established that, even in the absence of Aguilar's union activity, it would have discharged him, based on a reasonable belief that he had engaged in criminal misconduct directed at another employee.[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

In order to meet its burden under *Wright Line*, the Respondent must show that it had a reasonable belief that Aguilar actually threatened Cortes, and that it acted on that belief when it discharged him. See *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002) (citing, inter alia, *GHR Energy Co.*, 294 NLRB 1011, 1012–1013 (1989)).[12] We find that the Respondent met this burden here. When the Respondent made its decision to discharge Aguilar, it took into account not only Cassone's repeated conversations with Cortes about Aguilar's threat, but also Cortes' decision to involve the police and Aguilar's subsequent arrest.[13] The reasonableness of the Respondent's decision to act on this information was subsequently validated when the state court issued a protective order requiring Aguilar to stay away from Cortes and his family for 6 months. In short, Cortes' account was found sufficiently meritorious in the criminal proceeding to warrant Aguilar's subsequent arrest, and the issuance of the protective order. Accordingly, the Respondent has demonstrated that it had a reasonable belief that Aguilar engaged in criminal misconduct warranting his discharge.[14]

The Respondent did not interview Aguilar and Calderon during its investigation. We disagree with our dissenting colleague's assertion that this omission demonstrates an overriding discriminatory motive. It is true that an employer may not assert a reasonable belief that an employee has engaged in misconduct based on a sham investigation. *Midnight Rose Hotel & Casino*, 343 NLRB 1003 (2004). Nevertheless, interviewing the subject employee is not the sine qua non of an adequate investigation. See *Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999). "The fact that an employer does not pursue an investigation in some preferred manner before imposing discipline does not establish an unlawful mo-

[9] Cortes testified that he told Cassone that Aguilar said "I will break your bones and I will knife you." The judge did not address this minor testimonial discrepancy. In our view, the threat of violence is egregious without regard to whether it extended to Cortes' family.

[10] The criminal proceeding was subsequently resolved in mid-2000, well after the Respondent decided to terminate Aguilar, pursuant to an adjournment in contemplation of dismissal, a disposition which did not address the merits of the underlying complaint.

[11] The Respondent has not excepted to the judge's finding that the General Counsel met his initial burden of proving a discriminatory motive under the standard set forth in *Wright Line*, supra.

[12] Had a determination been made that Aguilar actually threatened Cortes, Aguilar would have lost the protection of the Act and his discharge would be lawful. As noted above, the judge refused to consider whether the threat was actually made.

[13] Contrary to the dissent, the Respondent has asserted that it based its decision to discharge Aguilar on these factors.

[14] Our dissenting colleague's assertion that Cassone improperly "orchestrated" the police involvement on which the Respondent relied in making its decision is unavailing. First, while Cassone suggested that Cortes might want to file a police report, he did nothing to change Cortes' mind after he initially rejected that suggestion. Second, Cortes requested that Cassone accompany him to the police station; Cassone did not volunteer. Third, Cassone made a reasonable choice between notifying the police and allowing a criminal suspect to remain at large.

Contrary to our dissenting colleague, we find nothing suspicious in the Respondent's suggestion that Cortes report to the police a serious threat to his life. Nor do we find that the fact that the Respondent engaged in unfair labor practices invalidates this reasonable action.

tive for the discipline." *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004).

No reason has been shown why Cassone should not have believed Viegas' account of the incident. Cassone did not immediately seize upon that account as grounds for discharging Aguilar. Instead, after hearing from Viegas that Aguilar threatened Cortes, Cassone initiated an investigation by seeking Cortes' story. When Cortes initially declined to take his complaint to the police, Cassone did not pressure Cortes to reconsider, go to the police himself, or initiate any other adverse action against Aguilar. It was only after Cortes independently decided to involve the police, and after the police arrested Aguilar on Cortes' charge, that Cassone decided to terminate Aguilar. By that point, the authorities had sufficiently corroborated Cortes' charges against Aguilar.[15] Rather than questioning Cassone's reaction to Cortes' complaint, we find it significant that Cassone did not immediately discharge Aguilar. See ibid.

We further disagree with our colleague's unsubstantiated assertion that the Respondent's failure to interview Aguilar or Calderon was a deviation from its normal practice. In support of an identical argument, the judge cited a single instance in which the Respondent interviewed two employees alleged to have engaged in a "shouting match." In the next sentence, the judge recognized that the Respondent did not always follow this "practice." Thus, the evidence does not show that the Respondent regularly interviewed employees engaged in misconduct, much less those alleged to have engaged in criminal misconduct.[16] In these circumstances, we refuse to find that the Respondent's internal process deviated from any established norm.

For the foregoing reasons, we find that the Respondent has met its *Wright Line* burden to show that it would have discharged Aguilar even absent his union activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, J.J. Cassone Bakery, Inc., Portchester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified below.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of the Board's Order, offer Cesar Calderon, Cabrilio Flores, Jose Mario Castro, and Lorenzo Macua full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 26, 2007

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

The Respondent has conceded that it had an unlawful motive in discharging union supporter Adan Aguilar—an unsurprising concession, in light not only of the evidence establishing that the Respondent first threatened Aguilar and then suspended him unlawfully, but also the Respondent's reprisals against other prounion employees. Where the General Counsel has made a strong initial showing that an employer's action was motivated by antiunion animus, the employer bears a "substantial" burden to prove that it would have taken the same action regardless of that unlawful motive.[1] Contrary to the majority, the Respondent has not carried the substantial burden of establishing its defense.[2] The record shows that the Respondent was intent on unlawfully separating Aguilar from its work force even before his final discharge and that it eagerly seized on the incident for which Aguilar was discharged.

The Respondent identified Aguilar as one of the early leaders of the Union's organizing drive, a campaign that it attempted to crush through, among other unlawful acts, the suspension and discharge of employees who supported the Union. In this regard, we have found that the Respondent violated Section 8(a)(3) and (1) by indefinitely suspending Aguilar on November 12, 1999,[3] "pending an investigation occurring on the night of November 12." That investigation effectively ended 3 days later without a conclusive result. Nevertheless, Aguilar's suspension continued indefinitely and without explanation. In fact, Aguilar was still on suspension 5 weeks later when the Respondent discharged him on December 20.

On the night of December 15, away from work, Aguilar assertedly threatened employee Marcelino Cortes, who had resigned from the Union's organizing committee. (Aguilar denies making the threat.) The next day,

[15] In light of these circumstances, Cassone's comments about Aguilar's veracity are immaterial.

[16] Moreover, the purpose of an interview is to confirm the veracity of an allegation. As noted above, the issuance of the arrest warrant, Aguilar's subsequent arrest, and the issuance of the protective order substantiated Cortes' assertion and buttressed the Respondent's good-faith belief that Aguilar had threatened Cortes with serious bodily harm.

[1] *Vemco, Inc.,* 304 NLRB 911, 912 (1991).

[2] I agree with the majority's findings in all other respects, including its findings that the Respondent committed other violations directed at Aguilar.

[3] All dates hereafter are in 1999.

Cortes told a co-owner of the Respondent, Rocky Cassone, about this incident, and Cassone suggested that Cortes report it to the police.[4] Cortes first declined, but at the beginning of his shift the next day, he told Cassone that he wished to report it to the police. Cassone personally took Cortes to the police station, and assisted him in filing a complaint. A few days later, when Cassone saw Aguilar outside the plant, he called the police, asked if there was a warrant for Aguilar's arrest, and volunteered that he could be apprehended outside the Respondent's facility. As a result, Aguilar was arrested and handcuffed in front of 15–25 employees. On December 20, the day prior to the representation election, Aguilar was discharged. The text of the discharge letter provided no explanation other than the summary statement, "Your employment with JJ Cassone Bakery has been terminated as of today 12/20/99." Aguilar was provided with no additional information at this time.

The Respondent relied only on Cortes' version of Aguilar's alleged threats, and declined even to interview either Aguilar or former employee and union supporter Cesar Calderon, the other participant in the incident. Its justification for this one-sided investigation is Cassone's conclusory testimony that Calderon was no longer employed (the Respondent had already unlawfully discharged him) and that Calderon and Aguilar would have lied. The Respondent provided no basis for prejudging whether either man would have told the truth.[5]

The Respondent's refusal to speak with Calderon or Aguilar about the incident also stands in contrast to the Respondent's normal practice. On earlier occasions when there was a confrontation between employees or between employees and supervisors, the Respondent's usual practice had been to interview the participants, even when mere verbal abuse was involved. It is certainly suspicious that the Respondent did not conduct interviews with respect to the more serious allegation of threats of physical harm. The majority relies on the existence of the protective restraining order to explain this departure from practice. But the Respondent itself has not represented that it relied on the restraining order in deciding against interviews. Nor has it been shown that the Respondent was even aware of the terms of the protective order at the time it made its decision not to conduct interviews. The Respondent's failure to permit Aguilar to defend himself before imposing discipline therefore supports an inference that the Respondent's motive was unlawful. See, e.g., *Embassy Vacation Resorts,* 340 NLRB 846, 849 (2003).

Further, the majority relies on Aguilar's arrest and the protective order to find that the Respondent would have discharged Aguilar even absent his union activities. At the hearing, however, when Cassone was asked to explain the reason for Aguilar's discharge, he ambiguously testified, "It had to do with the threats that he made against Marcelino Cortes and that whole incident." Accordingly, the Respondent itself has never clearly asserted that the protective order or arrest provided the basis for Aguilar's discharge. The majority also fails to take into account that the Respondent's owner orchestrated the most significant aspects of the involvement by the police. This included the Respondent's initial suggestion that Cortes (who had communicated his recantation of support for the Union) file a report, the personal attention provided by the Respondent's owner in driving Cortes to the police station and helping him file the report, and the owner's calling the police 2 days later (and 3 days before the election) in order to facilitate Aguilar's arrest in front of a large number of fellow employees. The type and degree of attention provided by the Respondent's owner regarding this incident, combined with the Respondent's one-sided review of the incident, shows that the Respondent essentially employed a pretext to convert Aguilar's unlawful indefinite suspension into a termination.[6]

As demonstrated by a full review of the record, the Respondent has failed to make out its *Wright Line* defense.[7] Accordingly, its discharge of Aguilar should be found unlawful under Section 8(a)(3).

Dated, Washington, D.C. June 26, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[4] It is noteworthy that in reporting the incident, Cortes was also informing Co-owner Cassone that he had recanted his prior support of the Union. Given the Respondent's hostility toward the Union and its reprisals against union supporters, it is easy to understand why Cortes might have done so.

[5] The only other time where the Respondent had questioned Aguilar's veracity was during the investigation mentioned above. This incident, however, actually reinforces the inference of a strong discriminatory motive, because (as found) the Respondent's decision to suspend Aguilar pending investigation was itself unlawfully motivated.

[6] I would therefore affirm the judge's conclusion that it is unnecessary to resolve the conflicting evidence on whether Aguilar in fact made the threat alleged, because it is apparent that the Respondent had previously resolved to discharge Aguilar because of his union activities and then later seized upon Cortes' allegations as the justification for executing the planned termination.

[7] *Wright Line*, 251 NLRB 1083 (1980).

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or discharge you because of your membership in, support for, and/or activities on behalf of Bakery, Confectionary and Tobacco Workers' Union, Local 3 (Union).

WE WILL NOT threaten you with unspecified reprisals because of your membership in, support for, and/or activities on behalf of the Union.

WE WILL NOT question you about your membership in, support for, and/or activities on behalf of the Union and WE WILL NOT question you about other employees' union membership or activities.

WE WILL NOT threaten you that you would lose your pension plan and would be discharged if the Union was successful in organizing you.

WE WILL NOT demand that you cease organizing for the Union.

WE WILL NOT announce a new benefit consisting of a policy of giving loans to you for emergencies, and WE WILL NOT deny existing benefits to you in order to induce you to cease your support for the Union.

WE WILL NOT tell you that the Union would ask you for proof that you are legally authorized to work in the United States which would cause you to be discharged.

WE WILL NOT threaten you that the Union would force us to reduce your hours of work and WE WILL NOT threaten that you would lose other benefits if the Union won the election.

WE WILL NOT create the impression among you that your activities on behalf of the Union are under surveillance by us.

WE WILL NOT tell you that it would be futile for you to support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Cesar Calderon, Cabrilio Flores, Jose Mario Castro, and Lorenzo Macua full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Cesar Calderon, Adan Aguilar, Cabrilio Flores, Jose Mario Castro, Lorenzo Macua, and Roberto Lostaunau whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Adan Aguilar and the unlawful suspensions or discharges of Cesar Calderon, Cabrilio Flores, Jose Mario Castro, Lorenzo Macua, and Roberto Lostaunau, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

J.J. CASSONE BAKERY, INC.

Geoffrey Dunham, Esq., for the General Counsel.
Marc Silverman, Esq. (Schiff Hardin LLP), of New York, New York, for the Respondent.
Bruce Cooper, Esq. (Haydon, Straci & Cooper), of New York, New York, for the Union.

SUPPLEMENTAL DECISION

Procedural Background

STEVEN DAVIS, Administrative Law Judge. On January 31, 2002, Administrative Law Judge Howard Edelman issued a decision in this matter. On December 6, 2005, the Board issued an Order Remanding Proceedings in which it stated that it was satisfied that Judge Edelman "conducted the hearing impartially and in an appropriately judicial manner, and we do not suggest that the judge's findings were in error," but decided that remand to a different judge was required because Judge Edelman's copying of extensive portions of the briefs filed by the General Counsel and the Union gave the appearance of partiality and suggested that he failed to conduct an independent analysis of the case's underlying facts and legal issues. 345 NLRB No. 111.

The Board's Order directed that the new judge review the record, issue a reasoned decision, and reopen the record only if necessary. The Board stated that the new judge "may rely on Judge Edelman's demeanor-based credibility determinations unless they are inconsistent with the weight of the evidence. If inconsistent with the weight of the evidence, the new judge may seek to resolve such conflicts by: one, considering the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole [citations omitted] or two, in his/her discretion, reconvene the hearing and recall witnesses for further testimony. In so doing, the new judge will have the authority to make his/her own demeanor-based credibility findings."[1]

The Board remanded this case to Chief Administrative Law Judge Robert A. Giannasi for reassignment to a different judge, and on December 13, 2005, he reassigned it to me.[2]

STATEMENT OF THE CASE

On various dates in November 1999 and February and April 2000, Bakery, Confectionary and Tobacco Workers' Union, Local 3 (Union) filed certain charges, and during the course of the hearing, in July and September 2000, Lorenzo Macua, an individual, and Cabrilio Flores, an individual, respectively,

[1] No party requested that I reopen the hearing or recall any witness for further testimony, and I have not done so.

[2] I offered the parties an opportunity to file a brief with me concerning the Board's Order, but none did.

filed certain charges against J.J. Cassone Bakery, Inc. (Respondent). Based on the above charges, complaints were issued on February 22, May 18, and October 19, 2000, against the Respondent, and the cases were consolidated for hearing.

The complaints, which were amended at the hearing, allege essentially that the Respondent (a) threatened employees with loss of benefits, loss of pension benefits, closure of the facility for 3 months, and with discharge if the Union won the election; (b) interrogated employees concerning their union support, their union activities, their union membership and the union membership of other employees; (c) threatened employees with discharge if they supported the Union; (d) threatened employees with unspecified reprisals because they supported the Union; (e) interrogated employees about their union sympathies and about their support for the Union in the upcoming union election; (f) harassed employees because they engaged in union activities; (g) created the impression among employees that their union activities were under surveillance by the Respondent; (h) threatened its employees with unspecified reprisals because they engaged in union activities; (i) promised benefits to its employees in order to dissuade them from supporting the Union; and (j) informed its employees that it would be futile for them to select the Union as their bargaining representative.

The complaints further allege that the Respondent discharged its employee Salvador Concepcion because he engaged in concerted activities, and to discourage other employees from engaging in such activities. The complaints also allege that the Respondent suspended employee Cesar Calderon for 3 days and then discharged him, suspended employee Adan Aguilar for an indefinite period of time and then discharged him, suspended employees Cabrilio Flores and Roberto Lostaunau for three days, and discharged employee Jose Mario Castro, because they joined and assisted the Union and to discourage other employees from doing the same. The complaint which was issued during the hearing alleged the unlawful suspension and discharge of employee Cabrilio Flores, and the unlawful discharge of employee Lorenzo Macua because of their activities in behalf of the Union. In the case of Macau, it is also alleged that his discharge was motivated because he testified in this unfair labor practice hearing.

The Respondent's answers denied the material allegations of the complaints.

The Union filed a petition for an election on November 2, 1999, a Stipulated Election Agreement was approved by the Regional Director on November 24, 1999, and an election was conducted on December 21, 1999. The tally of ballots showed that of approximately 216 eligible voters, 38 voted for representation by the Union and 139 voted against representation. The Union filed objections, and on May 25, 2000, the Regional Director issued a notice of hearing on objections and order consolidating cases which consolidated for hearing the unfair labor practice case with the objections case.

On the entire record,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation having its office and place of business at 202 South Regent Street, Port Chester, New York, has been engaged in the operation of a commercial and retail bakery. Annually, the Respondent purchases and receives at its facility goods and materials valued in excess of $50,000 directly from suppliers located outside New York State. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Organization and Background

The Respondent is a family-owned bakery which was begun in 1910. Its current owners and shareholders are "Rocky" Thomas Cassone and his sister, Mary Lou Cassone. Its building comprises about 110,000 square feet and is situated on 3 acres. There is a basement and a main floor which contain the ovens and packaging areas, the truck bays are located on the main floor, and there is a second floor office level. A retail store is situated on the main level. Respondent's facility operates on a 24-hour per day, 7-day per week schedule.

The Respondent employs individuals who have been stipulated to be statutory supervisors. They are Abey Abraham, Moises Contreras, William Cranisky, David Locke, Anthony (Tony) Sena, Tony Venegas, and Aurelio Viegas (at some point after he assumed Abraham's duties). The admitted supervisors such as Abraham, Locke, Sena, and Venegas wore a white shirt and blue pants.

The Respondent also employs leadmen who report to the supervisors set forth above. The complaint alleges, and the answer denies, that the leadmen are statutory supervisors and agents. The leadmen at issue are Jon Cassone, a second cousin of Rocky and Mary Lou Cassone, Guillermo Serra, and Viegas, prior to his assumption of Abraham's duties. Those leadmen wore a green shirt and green pants. Production and shipping employees wore a white shirt and white pants.

B. Credibility

The Board's Order Remanding stated that I may rely on Judge Edelman's demeanor-based credibility determinations unless they are inconsistent with the weight of the evidence. Such determinations may be based on "nervousness of the witness, self-contradiction and evasiveness." *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 421 (2004).

Judge Edelman made certain demeanor-based credibility determinations.[4] After a careful review of the record, I find that

[3] Aside from the decision of Judge Edelman and the Board's Order Remanding, the record consists of the transcript of the hearing, the exhibits, the briefs filed by all parties with Judge Edelman, limited exceptions filed with the Board by the General Counsel, and the brief on exceptions filed with the Board by the Respondent.

Certain exhibits were missing from the official General Counsel exhibit file, including the charges, complaint, and answer in Cases 2–CA–33144 and 2–CA–33267, which were filed during the hearing. Those documents were given exhibit numbers by Judge Edelman and were intended to be included in the record. I have been provided copies of those documents by the General Counsel, and I have included them in the exhibit file as GC Exh. 1(y).

[4] In discussing the evidence concerning leadmen, Judge Edelman credited the General Counsel's witnesses because he was "more impressed with their demeanor" and they "appeared to me to be more forthright and less evasive" than the Respondent's witnesses. 345 NLRB No. 111 fn. 1. Judge Edelman also credited all the General Counsel's witnesses "based upon their detailed testimony which was consistent on both direct and cross examination and my favorable impression of their demeanor"—Id., slip op. at 4. He noted that witness Calderon gave a "forthright and detailed account" of an unlawful threat,

Judge Edelman's demeanor-based credibility determinations, with the exception of his credibility determination as to Concepcion, are completely consistent with the weight of the evidence, and are also fully supported by the evidence. I therefore have relied on them.

In addition to the demeanor-based credibility determinations, which I rely on, the credibility determinations I have made are based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. In making such determinations, however, I have discredited Concepcion as to the threat allegedly made to him by Supervisor Abraham which will be discussed below.

C. The Supervisory or Agency Status of the Leadmen

1. The facts

The complaint alleges that the leadmen are supervisors and/or agents of the Respondent. The Respondent asserts that they are neither.

David Locke, who has been the Respondent's general manager for 13 years, testified concerning the duties and authority of the leadmen who work in the packing and distribution areas, there being no leadmen in the oven area. He stated that the leadman is responsible for the line he works on. For example, he is responsible for the proper loading of the trucks, and must ensure that the product is distributed in the proper way by checking that the orders are filled properly. Locke testified that there were three leadmen working at night, each of whom was responsible for 7 to 10 employees. The leadman also receives papers from the office which set forth: (a) the total order, (b) how much product should go to which specific customers, and (c) the pricing and date code numbers for the product being manufactured. The leadman's responsibility is to ensure that the bread is of the proper quality, and that, pursuant to the order sheets it is packaged in the proper wrapping, the proper pricing codes and dates are placed on the package, and that the orders were filled properly. He must report to the supervisor any shortages, overages, quality problems, or employee problems, such as an absent worker or an employee who refused an order. If a package contains fewer products than ordered, the leadman inserts the additional product. Specifically, the leadman could tell an employee to increase his work speed. However, the leadman could not create a confrontation with employees, but instead must report any employee-related problem to his supervisor. Depending on the job being performed, a new employee may be trained by the leadman.

Locke stated that employees are acquainted with their jobs and do not require daily instruction regarding how to do their jobs, inasmuch as they work on the same machine each day. The leadman receives instructions from the supervisor which he communicates to the employees on the packing line. For example, if more employees are needed in a different area, the supervisor asks the leadman to transfer the worker.

Supervisor Anthony Sena testified that he is the night manager in charge of the bakery and its 100 to 200 employees employed in the evening. He stated that leadmen such as Serra are in charge of and "run" their own departments, making certain that production is done timely and properly. He expects the leadmen to act on their own regarding moving employees from one machine to another to cover areas that are short-handed, and starting and stopping production due to a lack of employees or a machine breakdown. But if an issue arises concerning insubordination, or that an employee is not working properly or fighting, the leadman should contact Sena immediately.

Sena also testified that if an employee has to leave before his shift ends, the leadman may permit him to leave, and then tells Sena later. However, the leadman must find a replacement for that employee. Sena testified that in his absence on Friday or Saturday nights, he expects the leadmen to assume even greater responsibilities by being more vigilant as to their areas.

a. Guillermo Serra

Serra is a long-term employee who was a leadman in the packaging department where he worked on a packaging machine with seven other employees. He reported to Supervisors Sena, Viegas, and Locke. When working on the packaging machine, he performed the same work as the employees.

Serra testified that he did not possess any of the statutory duties or authority of a supervisor. However, he stated that occasionally a coworker would tell him that he would be late the following day, and he reports that information to Supervisor Sena. If an employee does not come to work, he reports that fact to Locke and tells him that a replacement worker is needed. He stated that he has no authority to resolve disputes between employees who work at his machine, but as a coworker he advises them to stop. If the dispute continues, he notifies his supervisor. Employees ask Serra if they can take a vacation at a certain time. Serra transmits such requests to Sena who speaks to Locke, and both men then make the decision.

Serra testified that occasionally an employee on his shift became ill and went home. Serra reported that to his supervisor and asked that another worker be assigned. He added that the worker must wait until the supervisor arrives, and the supervisor gives him permission to leave. Serra denied disciplining anyone or recommending discipline. However, he testified to an incident in which a machine was not functioning properly causing bread to fall on the floor. He told the workers that they should stop the machine and pick up the bread. Rosa Macua refused to pick up the bread. Serra told her that the entire team must pick up the bread. She left her work area and went to the lunchroom, asking him to give her a paper so that she could collect unemployment insurance. He told her to report to the office. Later, he apologized, and she returned to work, but she left work early, with Serra's permission, because she did not feel well.

On January 11, 2000, Cabrilio Flores was given a letter signed by Mary Lou Cassone stating that Flores was asked by Serra to separate rolls, and he answered in an "incorrect way." The letter stated that Serra was employed for 40 years and that Flores must "do your job as told and the next time that you are asked to do something and don't do it you will be suspended for 3 days." In this connection, Locke stated that the Respon-

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and Flores' and Macua's account of an interrogation were detailed. Respondent's witness Serra's testimony "from the beginning was beset with contradictions," was "vague and unclear," prone to "excessively emphatic responses," and lack of recollection." Id., slip op. at 5. Judge Edelman found Jon Cassone to be evasive—Id., slip op. at 6. Biermann gave shifting testimony—Id., slip op. at 9. He found conflicting testimony between Locke and Mary Lou Cassone and their "overcompensating in inventing justifications" as to the same event—Id., slip op. at 9. Judge Edelman also noted the contradictory and inconsistent testimony between Viegas and Locke—Id., slip op. at 10. Flores' testimony was corroborated by timesheets—Id., slip op. at 10, and Lemus' testimony was inconsistent—Id., slip op. at 12.

dent has a policy prohibiting disrespectful conduct toward supervisors. At hearing, Mary Lou Cassone testified that Serra was training Flores and reported that Flores was not doing his job properly, which resulted in the letter sent to Flores. Serra testified that he did not train Flores, and told him as a coworker that he was not separating the bread properly, but denied speaking to any management personnel about that shortcoming or that he was not obeying his orders. He also conceded telling Flores that his lateness was causing production to be delayed, and also told Flores that he was not performing his work properly, but denied reporting such malfeasance to anyone.

I cannot credit Serra's testimony that he did not report Flores' poor work. Mary Lou Cassone testified in contradiction that Serra did report that Flores was not working correctly and she issued a letter to Flores to that effect.

Flores testified that Serra transferred him from the ovens to the packing area about two or three times per week. Serra denied, however, that he transferred employees on his own. He stated that if there were fewer workers than needed in the oven area he would call his supervisor who would send another employee. Serra said that when employees waited for a broken packaging machine to be fixed, they automatically move to another machine without someone ordering them to do that. Serra made sure that the proper number of rolls were produced and, if not, he added rolls to the quantity.

Serra stated that he received the same benefits as others who worked on the machine he worked on. However, he received annual bonuses from the Respondent which, according to the payroll records, was $800 in 1999.

b. Jon Cassone

Jon Cassone is the second cousin of Rocky and Mary Lou Cassone. He owns no stock in the Respondent. Cassone identified himself as the leadman working on a seven-person packing and slicing line, called (the Allied crew). He filled and checked the packaging orders, and helped the drivers with their boxes and trays. He denied having any supervisory authority, but stated that his authority consisted of ensuring that the packaging was done properly. He often transferred employees from the packing to the oven department when additional workers in the oven department were needed. He did that at the standing request of Supervisor Contreras who told him that if an oven employee is absent he should transfer a packing department worker to the oven area. He also assigned employees to fill an order and take it to the truck bay, but added that other employees also give such orders. He is also responsible for setting up the packaging and slicing machines, and arranging supplies and materials for the workers.

Cassone received complaints about fellow employees from other workers, but told them to address their complaints to Contreras or Locke. Inexplicably, he testified that when employees on his line do not pay attention or engage in horseplay, he does not tell them to return to work, but rather, he does their jobs. However, he shows new employees the correct way of packing if they are not working properly. He or other employees trained new workers in his crew, which consisted of a 30-minute demonstration of how to insert the product into the packaging machine. He stated that although he does not discipline employees if an employee was not working properly he makes a "suggestion," but not a recommendation to Contreras that a worker be disciplined.

Cassone stated that he is expected to notice problems on his line, and to report those problems to Contreras. At times Cassone complained to Contreras that a worker was absent frequently but no disciplinary action was taken against him, whereas Cassone was treated more harshly. When overtime work is needed that Cassone and other workers will perform, Cassone decides which other employees are asked, based on who he works well with. Cassone informs Contreras of his choices and Contreras asks those employees if they want to work overtime.

Cassone stated that many workers called him a supervisor. Indeed, Biermann testified, as set forth below, that when he was given a union card by Calderon he turned it over to Cassone because he was a supervisor and manager.

Cassone received bonuses of $300, 400, and 500 in 1997, 1998, and 1999, respectively. He stated that he received the same benefits that other employees received.

Lostaunau told Cassone that he had to go to the doctor and would be 10 to 15 minutes late. Cassone replied that he would tell Abraham, and he did so. Cassone at first stated that he gave Lostaunau permission to be late, but then stated that he did not give him such permission. Calderon and Aguilar testified that when Calderon reported to Viegas a threat made by Jon Cassone to Aguilar, discussed below, Viegas said that Cassone would not listen to Viegas, as they are both supervisors, and that he should report it to Mary Lou Cassone.

Antonio Castaneda testified that he worked with Jon Cassone on Saturdays, and that Cassone told him to report to work at 1 p.m., but that if he finished work at 3 a.m., and an oven employee was absent, Cassone would ask him to work on the ovens until 4 a.m., and he would do so. In addition, when he was hired in May 1997, Castaneda was told by Viegas that as a new worker he had to obey Cassone, Lemus, and Abraham because they wore green uniforms. Cassone admitted that he worked with Castaneda on Saturdays, but denied telling him to report to work at 1 p.m. that day.

It must also be noted that Jon Cassone gave Mary Lou Cassone the two union cards that he obtained from employee William Biermann. Accordingly, Jon Cassone followed the Respondent's instruction, below, that a "management representative" should "turn in any union literature found around the premises." Accordingly, Jon Cassone was considered a "management representative" in fulfilling that responsibility.

c. Aurelio Viegas

Viegas was a leadman until Supervisor Abraham was fired. Sena stated that following Abraham's discharge in November 1999 Viegas was in training to become a supervisor and was actually appointed in January 2000, but in fact Viegas was performing Abraham's duties in December 1999, and being evaluated on his performance. Viegas stated that he was promoted in February 2000. He was paid a weekly salary because, according to Rocky Cassone, when he was hired he asked for a certain amount of money. Other stipulated supervisors were also paid weekly salaries except Tony Venegas who received an hourly rate. Viegas received bonuses of $300 and $400 in 1998 and 1999, respectively.

Prior to his promotion to supervisor, Viegas worked was a leadman and was responsible for his bread line which consisted of seven employees. His duties consisted of receiving orders from the office and telling the employees the amount of product needed to be baked and packaged, and ensuring that those or-

ders were complete by counting the amount of product going into each package, and counting each package. If fewer amounts of bread were baked than orders received, he baked more bread, but reported it to Abraham. If too much bread was baked, he would package it for another order. He also made certain that the packages were taken to the delivery trucks.

Viegas denied that he possessed any statutory supervisory authority, and denied writing any warning letters to workers, stating that if there was a problem with production he would report it to his supervisor. However, on October 27, 1999, he issued a written "corrective action report" to Calderon for speaking to other employees while working, and not working properly.

Viegas testified that, when necessary, he could move an employee from one line to another with Abraham's authorization, and that if an employee was late or absent he could not replace that worker on his own if Abraham was present, but could obtain a substitute on his own if Abraham was not present.

Aguilar, who worked on the ovens, testified that Viegas told him the quantity of bread that had to be baked, and when the bread was not ready to be baked he told the workers to work in the packing area. Viegas transferred him about two or three times per week. Macua stated that he saw Viegas tell employees working on the packaging machine that their work was not done properly and they should be more careful.

Calderon stated that prior to Abraham's discharge, Viegas directed the workers, telling them that the bread was too short or too long, and ordering them to make it shorter or longer. He showed Calderon how to insert the bread in the packing machine. When Calderon heard that Abraham had been fired, he told Viegas that he heard that he would be assuming Abraham's position. Viegas agreed, saying that he was told to do Abraham's job.

David Locke, the Respondent's general manager, testified that when Abraham, the night supervisor, was absent from work, his responsibilities were assumed by a "consortium of leadmen" with Night Supervisor Tony Sena making the management decisions. Such night leadmen included Viegas. Locke further stated that when Abraham was terminated in November 1999, there was "quite a void," which was handled by Sena and Locke, although Locke was not present at night. As Locke described Viegas' duties, he acted, in effect, as an acting supervisor during his training. Sena and Locke asked Viegas for his opinion and recommendations concerning how he would handle certain situations. If Sena and Locke agreed, the matter would be handled as Viegas recommended. Viegas was training for Abraham's supervisory position during the 2-to 3-month period from November 1999 to January or February 2000, Viegas continued functioning as leadman and was not given all of Abraham's duties and responsibilities, but he had some of his responsibilities. Sena, however, continued to make management decisions.

2. Discussion

In *Mid-South Drywall Co.*, 339 NLRB 480 (2003):

> It is well established that where an employer places a rank-and-file employee in a position in which employees would reasonably believe that the employee speaks on behalf of management, the Respondent has vested that employee with apparent authority to act as the Respondent's agent, and the employee's actions are attributable to the Respondent. The record is clear that the leadmen were not statutory supervisors. They did not have the authority to, and did not in fact hire, fire, suspend, promote, or recommend those actions.

The record is also clear, however, that the leadmen are agents of the Respondent. Thus, although they performed manual work, they were responsible for the line they worked on, and ensured that the bread was baked properly and timely by the seven employees they worked with on their line. They received production orders from the office and instructions from the supervisors which they transmitted to the employees, and made sure that orders were filled properly and packaged appropriately. The leadman trains new employees, and could direct an employee to work faster and pick up bread, and advises them to cease an argument with a coworker.

The leadman moves employees from one machine to another to cover areas that are short-handed. They permit an employee to leave early or come in late. The leadman reports production and employee problems, absences and vacation requests to the supervisor, and receives complaints from employees on their line about other workers. Viegas, when a leadman, assumed with others, certain of Supervisor Abraham's responsibilities when he was absent.

With respect to discipline, leadman Viegas issued a corrective action report to Calderon. Serra criticized Flores' work and warned him about his lateness. Flores was also warned by Mary Lou Cassone to obey Serra's orders or he would be suspended. Jon Cassone stated that he suggested that a worker not performing properly be disciplined, and also complained to Supervisor Contreras that a worker should have been disciplined for excessive absenteeism but was not.

Cassone also selected which employees should work overtime, and although he does not direct them to work overtime, the supervisor follows his selection. The production workers are paid by the hour and receive no bonuses. The leadmen as a rule are salaried and receive annual bonuses. Their uniforms, which are green, are distinct from that of the production workers, which are white. The employees refer to the leadmen as supervisors. *Mid-South Drywall Co.,* above.

In finding that leadmen were agents in *Rainbow Painting,* 330 NLRB 972, 987 (2000), the Board noted that the leadmen, as here, were responsible for insuring that the work was performed according to the employer's standards, and had the authority to criticize employees' work performance. In addition, in *Poly-America, Inc*., 328 NLRB 667 (1999), the leadmen, as here, acted as conduits in relaying to the employees directions from the employer regarding production and other matters.

Similarly, in *Waste Stream Management*, 315 NLRB 1099, 1122 (1994), the employees found to be agents assigned work, saw that it was done properly and timely, answered employee questions when they could and checked with the supervisor when they could not.

In *D&F Industries*, 339 NLRB 618, 619 (2003), as here, the employees found to be agents relayed to the supervisor rules infractions and when asked, told him about employee performance, and relayed to management employee problems and complaints. They "moved employees from one production line to another as needed to respond to staffing shortages or during product changes on a line." They also authorized employees to leave work early or take time off in the case of an emergency or illness. Also, similar to the instant case, the agents had to ensure that the packaging process operated on schedule and that the employees worked productively, made sure that the ma-

chines functioned properly, that production lines were adequately staffed and supplied, and that orders were filled appropriately.

As set forth above, the record is quite clear, and I find that Guillermo Serra, Jon Cassone, and Aurelio Viegas were the Respondent's agents, and that statements by them are attributable to the Respondent. *Mid-South Drywall*, above. By placing the leadmen in a position where they are in charge of a line and must ensure the quality and production of the product manufactured, they possess the authority to also enforce that the employee on that line work effectively. Accordingly, the employees would reasonably believe that based on the leadman's position in charge of the line in which they work, and through whom they are given their orders and instructions, the leadmen act in behalf of management and thereby speak in behalf of it.

D. The Organizing Campaign and the Respondent's Knowledge Thereof

The Union has attempted to organize the Respondent's employees five or six times in the past, and has participated in four or five elections, all of which it lost. The Respondent was found to have unlawfully discharged two employees in 1985. *J.J. Cassone Bakery,* 288 NLRB 406 (1988).

Cesar Calderon, a paid union organizer, became employed on August 4, 1999,[5] with the Respondent for the purpose of organizing its workers. The campaign began in the first week of September 1999, when a group of employees formed an organizing committee. Calderon distributed about 30 authorization cards to other workers with instructions that they solicit their coworkers.

Rocky Cassone was admittedly told in September by certain employees that Calderon solicited them to support the Union. At that time, he also knew that Adan Aguilar was "working for the Union." Cassone testified that when he learned that Calderon and Aguilar were supporting the Union, he told Supervisor Abraham that they were trying to organize for a union and that he should make sure that neither worker distributed literature while they were working, and if they did, he should report it to Cassone.

On September 8, Rocky Cassone issued a letter to all employees advising them as to what to say when asked to sign a card. On September 15, he wrote another letter advising them that the Union would "try every trick possible to get you to sign a card," and advised that they have the right not to sign a card.

In September, counsel for the Respondent gave Rocky Cassone a five-page document containing "do's" and "don'ts" concerning their behavior during the campaign. The document instructed its supervisors that they should not promise, threaten or interrogate employees, or discriminate against them because of their union activities. Also included in the document is the direction that "management representative [sic] should pass up the line any items of employee dissatisfaction and to turn in *any* union literature found around the premises" (emphasis in original), and the following:

> 6. In any campaign where the issue is "union or not?" you should not be "noncommittal." Even at the risk of being overzealous and even if innocently you should commit an unfair labor practice, in the long run it will work out better if you take a stand. When employees are on the fence as far as how they will vote, the personal feelings of their supervisor for or against the issue is often determinative. When those representing the company appear to be in doubt and standoffish, the employees likely will conclude that the company doesn't care how they vote. The employees may then vote for the side that appears most interested and, of course, most persuasive.

On October 27, Mary Lou Cassone wrote to remind employees about the Respondent's no-solicitation/no-distribution policy—"people should not be bothering you while you are working and you should not be interfering with others while they are working."

The Union filed a petition for an election on November 2.

On November 13, the Union sent a letter to the Respondent which it received, listing the names of 18 employees as the Union's organizing committee. Those names included Adan Aguilar, Cesar Calderon, Jose Maria Castro, Cabrilio Flores, Roberto Lostaunau, Lorenzo Macua, and Concepcion Salvador. Rocky Cassone admittedly learned of the existence of a committee a couple of days before he received the letter.

E. The Alleged Interference with Employee Rights

These alleged violations will be discussed in alphabetical order by the name of the leadman who committed the violations. In making these findings, I particularly note that the Respondent's written instructions to its supervisors urged them to unequivocally state their position regarding the Union "at the risk of being over-zealous and even if innocently you should commit an unfair labor practice." I am aware that this document was distributed to its supervisors for their use, and not to the leadmen. However, I believe that the facts set forth below support a finding that the message contained therein was disseminated to the leadmen. The Respondent clearly opposed unionization of its facility, and in support of that position must have advised its leadmen to follow this instruction. The evidence concerning Jon Cassone, below, illustrates this. He was "overzealously" outspoken concerning his position opposing the Union and committed numerous unfair labor practices, innocently or not, in making his views known to the employees.

1. Jon Cassone

Cassone testified that he first became aware of the Union in about October 1999, and he reported his observations, particularly of Calderon, to Supervisors Locke, Contreras, and others. He then reported to Rocky and Mary Lou Cassone when he discovered that a union organizing campaign was underway. In early November, he knew that Calderon, Aguilar, Lostaunau, and Castro were involved with the Union, but he did not discuss them with Rocky or Mary Lou Cassone. He was not directed by them to report the union activities or the names of employees involved.

Aguilar, an active union supporter, testified that in the first week in November 1999 Cassone asked if he was a friend of Cesar Calderon. Aguilar answered that he was and questioned the inquiry. Cassone replied that, "Cesar Calderon's friends are not my friends. I think, it seems to me that you're also involved in the union. You'll see what's going to happen to you guys."

Castro stated that on about November 7 he was on a break in the lunchroom with 13 or 14 workers when Jon Cassone entered and shouted that the Union would not help them at all, and that they should not believe in the union movement or in Calderone. Cassone also asked Castro if he liked the Union. Castro quoted Cassone as saying "if the union wins, you lose pension plan." Cassone admittedly was aware that Castro was

[5] All dates hereafter are in 1999, unless otherwise stated.

"involved" in the Union, and admitted speaking to him, asking him whether he liked the Union, whether it was good, and whether the workers would get more money more quickly if the Union was in the shop. Cassone stated that he told Castro that he did not want the Union.

Calderon testified about an incident on November 1 involving employee Salvador Concepcion and Supervisor Abraham, in which Concepcion struck Abraham. That day, Concepcion told Calderon that Abraham was sexually harassing female employee Concepcion Herrera, which Herrera confirmed. The following day, November 2, Calderon and other employees protested to Rocky and Mary Lou Cassone that Abraham was harassing Herrera. They said that they would investigate the matter. Calderone testified that on November 10 Jon Cassone approached him with a smile and said that Abraham was discharged, "just back off the idea of bringing the union in here. All right?" Calderone replied that there would be an election, and Cassone answered, "You keep pushing for this. You're trying to bring the union in here and you're f–king up with my family and you're f–king with me; so you're going to see what's going to happen to you."

Thereafter, on November 11, Calderon made a complaint of harassment to the local police department, which issued a written report, essentially quoting the above threat by Cassone, as described by Calderon. Cassone denied that he threatened Calderon as set forth above, and also stated that Calderon told him that "if we get Abraham fired or out of here we'll back off the union."

Cassone testified that he wanted to see Calderon discharged because he was angry with him for bringing in the Union, and also because he sought to convince Cassone's wife to join the Union. Cassone admitted asking Calderon if he was a "union guy" because he heard employees speaking about it, and wanted to find out for himself whether he was a union organizer, essentially because he and the other workers were happy with the benefits provided by the Respondent, but inexplicably testified that perhaps he would join the Union also.

Cassone testified inconsistently that he did not believe that Calderon was hurting his family by bringing a union into the shop, but believed that Calderon was hurting Rocky and Mary Lou as his family, and was also hurting the employees who had worked there for more than 20 years.

Thereafter, Calderon was discharged and immediately asked Aguilar to accompany him to his locker. Aguilar did so. Calderon testified that while he was leaving the facility following his discharge on November 12, Jon Cassone, who was admittedly with him at the time, told him "just remember, try to bring the union in here; you are f–king with my family and you are f–king with me and you are going to see what's going to happen to you again." After Aguilar returned to work that day, Jon Cassone approached him and said, "[Y]ou are also involved in the union and . . . the same thing that happened to Cesar Calderon is going to happen to you." Calderon filed a report with the local police department, alleging that Cassone and Locke "attempted to intimidate him by using foul language and telling him that he should watch out if he attempted to start his labor union at this location." Cassone denied threatening Aguilar.

Employee Roberto Lostaunau testified that on November 11 as he emerged from the bathroom, Jon Cassone said, "You, Peruvian, you're a union." Lostaunau replied, "[Y]es. I am union" whereupon Cassone said, "[N]o union here, no, union to the street. If you vote for the union and the union comes in, we know you have a wife and three daughters and that your wife is not working; if the union comes in you are going to be out . . . we know how to silence those that are in the union. We know how to silence you." Cassone denied threatening Lostaunau in this manner.

I find first that Jon Cassone made the comments alleged as unlawful, as set forth above. He admittedly bore animus toward the Union, he resented Calderon, and reported his union activities to his superiors, and wanted to see him discharged because he brought in the Union, and sought to convince Cassone's wife to join. Cassone also admittedly asked Calderon if he was a "union guy" and also admittedly asked Castro if he liked the Union and whether it was beneficial to the workers.

I find particularly believable Calderon's testimony that Cassone told him that since Abraham was fired, he should "back off the idea of bringing the union in." Apparently, Cassone believed that Abraham's discharge would cause the union drive to be withdrawn, and believably urged that Calderon should cease his campaigning. Obviously, Calderon did not view Abraham's departure as a reason to halt the effort. Cassone's testimony, therefore, that Calderon suggested that if Abraham was discharged he would "back off the union" is totally unbelievable. Calderon was brought in to organize employees into the Union even before the incident involving Abraham's alleged harassment occurred. It is not likely that he would have dropped the organizing drive even if Abraham was dismissed, and he did not.

I, accordingly, find that the weight of the evidence, supported by Jon Cassone's admissions as to his animus toward Calderon and the Union, support a finding that he threatened Aguilar and Calderon with unspecified reprisals because of their support for the Union, informed employees that it would be futile for them to support the Union, interrogated Castro concerning his interest in the Union, threatened employees that they would lose their pension plan, threatened Lostaunau with discharge if the Union was successful, and demanded that Calderon cease organizing for the Union. Accordingly, I find that by the above statements to the employees made by Jon Cassone that the Respondent violated Section 8(a)(1) of the Act.

2. Mary Lou Cassone

Mary Lou Cassone testified that she and Rocky Cassone admittedly held group meetings with employees where they spoke about the benefits the Respondent provides to its employees and the negative aspects of union membership. She stated that she was told by employees that they were taken out for lunch or dinner by union representatives and provided food and beverages there. Her response was that their union dues would be supporting such endeavors.

Employee Jose Mario Castro testified that on about December 6, he attended a meeting of cleaning employees with Rocky and Mary Lou Cassone. According to Castro, Mary Lou, who admittedly speaks Spanish, told the workers that "I noticed that a lot of you had signed union cards under pressure of the organizers. I knew that the union organizers were meeting with the workers at a restaurant and that they were being given food and beverage. But that you always had the right to vote no."

Even assuming, as Mary Lou Cassone testified, that she was told that employees were taken out for meals by union organizers, she told the workers, according to Castro, that she knew

that they signed union cards under pressure, apparently at those meetings. Accordingly, if all she was told by the employees was that they were treated to meals, she had no reason to tell them that she knew they signed cards. The only possible reason for her doing so was to create the impression that their meetings had been under surveillance by the Respondent. This violates Section 8(a)(1) of the Act.

Employee Roberto Lostaunau stated that at one meeting Mary Lou Cassone said that loans are available for employees who may need them due to an emergency, and that employees needing a loan should ask for one. Lostaunau did not know whether such loans were available prior to that meeting, but he heard for the first time at the meeting that such loans were available, and it was only after the meeting was he aware that employees asked for such loans.

Mary Lou Cassone testified that the Respondent has had a long-standing policy for many years of providing loans to employees for emergencies such as family illnesses, deaths, and legal problems. There was evidence of about 10 loans given from 1989 to a period just prior to the Union's organizing. The Respondent did not provide evidence that employees were aware of such a benefit. Indeed, in a letter offered by the Respondent, Lostaunau wrote to Mary Lou Cassone in June, 1998, stating that his daughter needed an operation costing $10,000. He requested a transfer to his former position where he could work 7 days a week and earn enough money for the operation, and stated that in his present position he works fewer hours and earns less money. He attempted to see Mary Lou Cassone four or five times, but could not get an answer to his letter.

It is clear that if the Respondent had a known policy of granting emergency loans Lostaunau would have requested one in his letter, rather than a transfer to a different job. Further, although not phrased as a request for a loan, the Respondent could have treated the letter as such since Lostaunau stated that funds were needed for a medical emergency. Both factors favor a finding that the announcement of the emergency loan policy was a new benefit, and that the announcement violated Section 8(a)(1) of the Act.

The General Counsel's theory is that although loans may have been provided to employees prior to this meeting such loans may have been granted simply because employees asked for them. According to the General Counsel, prior to that meeting, the availability of loans was not a formal, announced benefit, or policy. Rather, only at this meeting, was such a formal, loan program announced, and therefore the announcement of a loan program violated the Act.

3. Rocky Cassone

Calderon testified that in early December 1999, after his discharge, he visited the Respondent's premises for 4 or 5days. On each day, he sat in front of the bakery singing songs with other workers who were arriving and leaving work. Jon Cassone threw pennies at him. Rocky Cassone cursed at him and told him to leave. Calderon replied that he was not interfering with anyone entering the bakery. They then cursed at each other. The police arrived and questioned him about his driver's license and his car's insurance, and asked if he had the "authority" to be there. Calderon said that he could "protest." The police officer then said that he was trespassing on the Respondent's property. Calderon admittedly had stepped off the sidewalk and entered the Respondent's parking lot.

The General Counsel argues that by calling the police the Respondent harassed Calderon. I do not agree. Apparently, Calderon had entered onto the Respondent's property and the Respondent lawfully called the police who responded to a complaint of trespassing. I will accordingly recommend that this allegation be dismissed.

4. Guillermo Serra and Aurelio Viegas

Calderon testified that on November 8 he overheard Serra and Viegas in the lunchroom addressing several employees. Serra asked, "[W]who recommended it to the people? If the union wins here, the union is going to ask them for legal papers and the green cards, and the company is going to have to fire them." Calderon then heard Viegas say, "[A]s soon as the union wins, the union is going to make the Respondent to cut down the hours, so you guys are only going to work 40 hours." The record establishes that certain employees work 6 to 7 days per week, 12 hours per day, clearly in excess of 40 hours per week. Viegas denied threatening the employees in that manner.

Cabrilio Flores testified that Serra told him that those involved in the Union's committee are "illiterate and ignorant and don't know what the Union means." He further stated that "if the union would win, we were going to lose the benefits." A few days later, Serra told him that management was going to start bothering all of the people involved in the union. Flores' testimony was somewhat confused as he testified that Serra's first threat was in January 2000 before the election. Of course, the election was held in December, so obviously Flores was mistaken as to the date of the threat.

Lorenzo Macua testified that in December, while he was having lunch in the lunchroom, Serra asked him if he signed a card. Macua replied that he did not know what Serra was talking about. Later, Serra asked him if he knew who signed cards, and Macua denied such knowledge. Serra then said "the stuff you're doing is no good."

Serra testified that he heard about the Union's organizing drive in September or November, but denied the conversations attributed to him by Calderon, Flores and Macua. He stated that he was neither in favor of it or against it. However, he gave his opinion that he was opposed to unions, explaining that the unions in his native country of Cuba lied to the workers and failed to give them the benefits promised.

Viegas testified that he had strong feelings about the Union, and when asked would discuss those feelings with workers when he was a leadman. He told them that the Respondent's benefits were better than they could receive with the Union, and that when he was a member of a union, it was not helpful after that Respondent closed.

I credit the employees' versions of their conversations with Serra and Viegas. They gave details about what exactly was told to them. In contrast, Serra inconsistently testified that he was neither in favor nor opposed to the Union, but spoke badly about a union in which he was a member. Viegas admittedly spoke to the workers about the union campaign and vigorously opposed it. Given the Respondent's instruction, above, to be overly zealous at the risk of committing an unfair labor practice, I believe that Serra and Viegas emphasized their opposition to the Union by committing the unfair labor practices set forth above. Further, in connection with his testimony concerning Calderon's suspension, below, Viegas exaggerated, by as much as four times, the amount of time that Calderon was away from his post—finally admitting that his memory was failing. Viegas apparently could not remember making the unlawful

statements.

Accordingly, I find that by telling employees that the Union would ask them for proof that they were legally authorized to work in the United States which would cause them to be fired, and threatening that if the Union won it would force the Respondent to reduce the workweek, and lose other benefits, and by questioning Macua if he signed a card, and if others signed cards, the Respondent violated Section 8(a)(1) of the Act.

F. The Alleged Discrimination Against Employees

Whether discipline of an employee violates the Act is governed by the test articulated in *Wright Line,* 251 NLRB 1083 (1980). Under that test, the General Counsel must prove that animus against protected activity was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or other protected activity by the employee, Respondent knowledge of that activity, and union animus on the part of the Respondent. See *Willamette Industries*, 341 NLRB 560, 562 (2004).

If the General Counsel makes the required initial showing, the burden then shifts to arespondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, "[a] Respondent cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993).

1. Cesar Calderon

a. The suspension

As set forth above, when the Union began its organizing drive in early September 1999, Rocky Cassone immediately became aware that Calderon was supporting it and was soliciting for the Union.

On November 1, while working at his oven, Calderon became aware of an altercation between Supervisor Abraham and employee Salvador Concepcion in which Concepcion allegedly punched Abraham. Calderon and other workers restrained Concepcion and took him away from the area. The police arrived and handcuffed Concepcion. According to Calderon, Concepcion asked him why he was being arrested. Calderon asked the police if he could translate their explanation for the arrest since Concepcion did not understand English. The police agreed, and Calderon translated their exchange with Concepcion. No arrest was made, Concepcion left the plant and Calderon returned to his work area. Calderon was away from his workplace for about 15 minutes.

Two days later, on November 3, Calderon received a letter suspending him for 3 days because "you left your work station (feeding the WP oven) without permission for a period of approximately 15 minutes."

General Manager Locke testified that management considers the reason why an employee left his workstation in determining whether discipline is warranted. Thus, in cases of emergencies, where an employee had a heart attack and another worker rushed to help him, no discipline would be imposed. However, Locke did not believe that Calderon's reason for leaving his work area was sufficiently important or necessary since Viegas, who was at the scene of the incident, could have translated, or a Spanish-speaking police officer who actually spoke to Concepcion, did the translating.

Calderon testified that leadman Viegas, who was present during part of Calderon's translation, thanked Calderon for interpreting. Viegas denied thanking him. Calderon stated that no management representative told him to return to work. Viegas said that he did not order his return because he had no authority to do so. Viegas observed that Calderon's two coworkers on the oven, Aguilar and Diaz, remained at their posts. Interestingly, Viegas testified that supervisor Abraham did not want Viegas to translate for the police. Viegas stated variously that Calderon was away from his oven for about 40 minutes, or 45 to 60 minutes, and then 20 to 25 minutes, finally admitting that his memory was failing.

There was much evidence regarding whether bread was in the oven when Calderon left, and whether it had to be thrown out because Calderon left his position. Such evidence is irrelevant and will not be discussed here because Calderon was disciplined only for being absent from the oven, not because bread was lost due to his absence. Surely, if production was lost or bread destroyed, the Respondent would have included that act of wrongdoing in its letter of suspension.

Abraham testified that before the police spoke to Concepcion, he told Calderon to return to the oven, but when Calderon was translating, he did not tell him to stop translating. Abraham further testified that he brought Viegas with him to translate for Concepcion, but Viegas stated that Abraham did not want him to translate. However, when Calderon began translating, Viegas was still with him and Abraham did not tell Calderon to stop, and Abraham did not tell Calderon again to return to the oven. Instead, he permitted Calderon to continue translating.

First, it does not seem likely that Abraham, immediately after being punched in the face, would have the presence of mind to order Calderon back to his work area. He stated that a couple of employees, including Calderon, assisted in pulling Concepcion away from him after he was struck, but apparently no one else was ordered back to his work area. His explanation was that Diaz and Aguilar returned on their own to the oven, but nevertheless they were absent from the oven for 4 minutes and received no discipline. During the second time that Abraham was attacked, packing employees intervened. There was no evidence that they were ordered back to their areas. Even if Abraham's testimony is believed that he told Calderon to return to the oven, it would appear that tacit permission was given for Calderon to be absent from the oven since Abraham permitted him to begin and continue translating, and did not again order him to return. Viegas, who was present at the time, could have enforced Abraham's order by insisting that Calderon return, but he did not do so.

Rather, it appears that Calderon was assisting in calming the situation by restraining Concepcion, leading him away from Abraham, and assisting the police investigation by translating their questions to Concepcion and his responses to them. All of his actions while he was away from the oven were in the Respondent's interest in diffusing a dangerous situation. Calderon's presence was especially important according to Dennis Scofield, an independent route driver, who stated that after Concepcion punched Abraham, he left the area but returned to attack Abraham again. However, certain workers intercepted Concepcion before he reached Abraham and brought him outside. Presumably one of those workers was Calderon since he was with Concepcion when he was restrained

and removed. Accordingly, Calderon was helpful in preventing a further attack on Abraham.

I find incredible Abraham's testimony that he ordered Calderon to return to the oven as soon as he intervened. As set forth above, I doubt that Calderon was his immediate concern after being punched in the face. Also, Viegas did not corroborate Abraham's testimony in this regard. In addition, his testimony was contradicted by Viegas who stated that Abraham did not want Viegas to translate. In addition, I cannot credit Viegas' testimony concerning the incident. He exaggerated by up to four times—up to 60 minutes the admitted amount of time given by the Respondent that Calderon was away from the oven—15 minutes.

As set forth above, Calderon was a leader of the Union's organizing campaign, and the Respondent learned very early in the drive that he was active in its behalf. As set forth above, I have found numerous violations of Section 8(a)(1) of the Act in the Respondent's reaction to the Union's attempt to organize its employees. It is clear that the Respondent bore animus toward the Union and toward Calderon, the leader of the drive, and that Calderon's suspension was motivated by such animus. I further find that the Respondent has not met its *Wright Line* burden of proving that it would have suspended Calderon even in the absence of his union activities. Its reason for the suspension, that he left his work area for 15 minutes without permission, is unpersuasive. Calderon did not leave his work area for personal reasons. Rather, he did so in an emergency, in order to restrain Concepcion, prevent further harm to Supervisor Abraham, and to translate during the police investigation of the incident. As Manager Locke stated, no discipline would ordinarily be imposed when an employee leaves his post in an emergency where, for example, an employee rushed to the aid of a coworker suffering a heart attack. Here, Calderon rushed to the aid of a supervisor who also sustained an attack, and an attempted second attack, but discipline was nevertheless imposed. I accordingly find that the Respondent's suspension of Calderon violated Section 8(a)(3) and (1) of the Act.

b. The Discharge

Calderon testified that he spoke to driver William Biermann about three times about the Union. Biermann seemed receptive to the idea of unionization, complaining about Supervisor Abraham's treatment of the workers, and saying that he would sign a card. Two weeks later Biermann asked for a card, and Calderon said he would give it to him in a couple of weeks.

Calderon further stated that on November 11, while they were working, Biermann approached and asked for union cards. Calderon said he would give him cards outside, but Biermann replied that he needed them now because he was leaving. Calderon gave him one, and Biermann asked for one more. About 1 hour later, Biermann returned and asked for cards written in English. Calderon said he did not have such cards, and Biermann asked him to get an English card, and that he would be "getting more people." Their conversation lasted 30 to 60 seconds and caused no stoppage of production.

Rocky Cassone testified that he approached Biermann, asking him "if there's anything about the union, what's going on that he understands that he wanted to talk to me about." Biermann replied that on the previous day Calderon gave him two union cards at his workstation, and asked him to sign one. Cassone asked if he had the cards. Biermann said he gave one card to Jon Cassone and had one at home. Rocky Cassone was told by Jon Cassone that Biermann gave him a card. Rocky Cassone then called Calderon to his office. Rocky Cassone denied telling Biermann to attempt to obtain cards from Calderon.

Rocky Cassone asked Calderon if he asked Biermann or other employees to sign cards while he was working on the oven. Calderon denied doing so. Cassone later again asked Biermann what happened and asked him to sign a document with his version of the solicitation. Biermann's statement said that he was given two cards—one for him and one for a friend Laurie who worked in the Respondent's retail store. Biermann gave one card to Jon Cassone and kept one in his car, and gave the second one to Jon the following day.

Biermann testified that in about October Calderon asked him if he was thinking about the Union, and Biermann replied that he was, and a few days later, at his oven, Calderon told him that a union would benefit the employees. Calderon then gave him two cards and told him that if he was interested in a union, he should take one and give one to a friend, sign it and mail it. Calderon said that he would obtain a card in English, but did not do so.

Biermann testified that he did not ask for the cards and did not want them. In fact, he did not want anything to do with the Union because he did not support it. However, he admitted asking for a card for his friend Laurie. Biermann gave one card to Jon Cassone who asked him to get a card in English— "the company needed" a card in English—the company being Jon Cassone, who he identified as a supervisor or manager. He also said that he asked for a card in English to see what it said "because I was going to hand it in the bakery and let them deal with it." In contrast, he later testified that no one from management asked him to get a card in English. He also testified that he wanted a card in English so that he would know what it said, and because he was "there to protect" the Respondent as he was employed by it. Biermann denied that he had instructions to give Jon Cassone a card, but the next day he gave the other card to Jon Cassone. Jon Cassone gave the cards to Mary Lou Cassone.

Calderon was given a letter which stated: "Your employment has been terminated as of 11/12/99. Your last paycheck will be mailed to you." No reason was given for the discharge in the letter, but at hearing, Rocky Cassone stated that Calderon was not discharged for violating its no-solicitation/no-distribution rule, but rather for "blatantly" lying about whether he gave a card to Biermann during working time. Rocky Cassone stated that at the time he decided to discharge Calderon, he was aware that Calderon was prounion and actively soliciting employees to join the Union.

It appears that Biermann acted in concert with the Respondent in orchestrating the circumstances leading up to Calderon's discharge. Thus, Biermann at first falsely told Calderon that he was interested in the Union, that he would sign a card, and that he wanted the cards for himself and Laurie and would be "getting more people." Obviously, Calderon would not have given him the cards if Biermann truthfully told him that he had no interest in it. Indeed, at hearing, he denied having any interest in the Union and stated that he did not ask for cards and did not want them. This is supported by the facts that he did not sign one and did not give one to Laurie.

Calderon offered to give Biermann the cards outside the facility but Biermann insisted on receiving them in the plant on working time, saying that he was leaving the facility shortly. "What was the rush?" The implication that Biermann was

working with the Respondent in this regard is clear in Biermann's reason for obtaining the cards when he did and giving them to Jon Cassone, and answers the question as to why he accepted the cards if he had no interest in the Union. It was no coincidence that Rocky Cassone asked Biermann at about the time of Calderon's solicitation if there was anything going on with the Union that Biermann wanted to tell him. Biermann believed that his role as an employee was to "protect" the Respondent, and handed the cards in because the Respondent "needed" them so that it may "deal with it." The result of demanding the cards while Calderon was on working time was that Calderon, in answer to Rocky Cassone's question, either had to admit to an apparent violation of the no-solicitation rule, or lie in denying that he gave Biermann the cards.

I find that although the Respondent's no-solicitation policy was facially valid it was disparately applied by enforcing it against union solicitation, and not against other types of solicitation. Solicitations not involving the Union were frequent, widespread, openly conducted, but did not result in any discipline.

Employee Castro testified that coworker Alex sold raffle tickets, without discipline, for his church in the working area of the plant, adding that several supervisors saw that activity, including his own supervisor, Cranisky. Castro added that employee Sosa also sold raffle tickets and he and another worker sold chocolates during working hours in the plant. Rocky Cassone admitted that he permitted a non-employee to sell items in the lunchroom, but later found him inside the factory and told him to leave and not return. Jon Cassone admittedly operated a "side business" selling shoes from a catalog. He stated that he sold four pairs of shoes outside the factory, but employee Antonio Castaneda said that Jon Cassone sold the shoes inside the bakery. Rocky Cassone told him he could not sell shoes in the bakery or on working time, and he then stopped.

The Board has held that an employer violates Section 8(a)(3) of the Act by disciplining employees for violations of its no-solicitation rule in the context of a union organizing campaign and in a manner disparate from past practices. The discipline of an employee for violating a no-solicitation rule by engaging in union activity violates Section 8(a)(3) of the Act when the discipline amounts to disparate enforcement of the rule. Discipline based on such disparate treatment may be found to be motivated by union animus. *Promedica Health Systems*, 343 NLRB 1351, 1362, 1381 (2004); *Clinton Electronics Corp.*, 332 NLRB 479 (2000).

First, as alleged in the complaint, I find that Rocky Cassone's questioning of Calderon as to whether he gave a union card to Biermann constituted unlawful interrogation, and was prompted by his effort to cause Calderon to be disciplined for admitting or denying the solicitation, and violated Section 8(a)(1) of the Act.

Second, I do not believe that it was a coincidence that Biermann asked Calderon for union cards when Calderon was working. In this connection, I do not credit Biermann's testimony that Calderon offered to give him the cards while he was working. Biermann's testimony concerning his interest in the Union was self-contradictory and inconsistent. Biermann feigned an interest in the Union when he clearly had no desire to be a part of the organizing effort. He only asked for the cards because the "company needed" them, and he decided to give them to Jon Cassone so that the Respondent could "deal with it," and thereby do his part in "protecting" the Respondent.

Thus, I credit Calderon that Biermann insisted on receiving the cards while Calderon was working, whereas Calderon believably testified that he offered to give him a card outside the building. In addition, Rocky Cassone's conveniently timed question of Biermann as to whether there was anything about the Union that was happening at that time that he wanted to tell him about was—even apart from being an unlawful interrogation—just too coincidental to have been innocently made.

I believe that the facts support a finding that the Respondent asked Biermann to request a union card from Calderon while he was working in order to place him in an untenable position - either admit soliciting for the Union while on working time, or deny such actions and be charged with lying. Thus, Cassone's unlawful and coincidental question to Biermann set in motion the question asked by him of Calderon which led to his discharge.

I accordingly find that the Respondent has not met its *Wright Line* burden of proving that it would have discharged Calderon in the absence of his union activities, and I find that his discharge violated Section 8(a)(3) and (1) of the Act.

2. Adan Aguilar

a. The suspension

On November 12, Locke gave Calderon his letter of discharge, and asked if he wanted to clean out his locker. Calderon agreed, and asked Aguilar, who was arriving at work, to accompany him to his locker to remove his personal items. According to Locke, who gave Calderon the letter of discharge, he told Aguilar that he need not accompany him, and should go to work. Aguilar allegedly replied that he and Calderon share a locker. In contrast, Mary Lou Cassone testified that Locke told her that Calderon told Locke that they shared a locker. Locke asked Jon Cassone to accompany them to the locker. The four men proceeded to the basement locker room. Aguilar saw that Calderon's locker was already open, and Calderon saw pieces of his broken lock on the floor and his belongings missing. According to Locke, the locker had a combination lock on it, which Calderon claimed was not his, accusing the Respondent of breaking into his locker and changing the lock. Calderon asked Jon Cassone if he knew anything about this, and Cassone smiled and told him to "get the f–k away from here." Calderon left, and Aguilar returned to work. Calderon filed a police report the same day claiming that his lock was broken and articles of clothing stolen from his locker.

Aguilar and Calderon denied saying that they shared a locker. Aguilar's locker is on the first floor.

Immediately after the visit to the locker, Locke told Mary Lou Cassone that the two men did not have a locker downstairs and did not share a locker, and that Aguilar lied in saying they shared a basement locker. Mary Lou Cassone admittedly learned that night that Aguilar's locker was on the first floor. Locke asked management personnel whose locker it was, and a notice was immediately posted on the basement locker that Calderon claimed was his, asking anyone who knows whose locker it was to tell management. No one responded, and in three days the locker was opened by the Respondent.

The Respondent decided to investigate the true occupant of the locker and also issued a letter to Aguilar dated November 12, stating that he was indefinitely suspended "pending an investigation occurring on the night of November 12." Locke claimed that when he followed the two employees to the locker, he was "dragged through the bakery" on a "bogus trip"—a

"wild goose chase," a "farce," and lied to by Aguilar concerning the identity of the occupant of the locker. He considered this activity an effort to "take advantage of management." Locke told Rocky Cassone that there was no disruption in production caused by this incident.

The investigation referred to in the letter solely concerned the question of whether the locker that Locke was taken to was in fact the locker used by Aguilar and Calderon. The investigation was, in effect, concluded 3 days later when no one claimed to know who occupied the locker, and it was opened by management. Nevertheless, Aguilar's indefinite suspension was not rescinded or withdrawn, and Aguilar was not asked to return to work.

As set forth above, Aguilar was, with Calderon, identified by Rocky Cassone as one of the early leaders of the Union's organizational campaign. Aguilar testified that he distributed 20 to 30 authorization cards to employees.

Based on my findings above and below that the Respondent's actions violated Section 8(a)(1) and (3) of the Act, a strong prima facie case has been established that its suspension of Aguilar was motivated by his union activities and by his association with Calderon. As set forth below, the fact that Aguilar was not asked to return to work following the conclusion of the investigation 3 days after it was begun, lends support to a finding that the Respondent simply wanted to rid itself of Aguilar, a known leading supporter of the Union.

I find that the Respondent has not met its *Wright Line* burden of proving that it would have indefinitely suspended Aguilar even in the absence of his union activities. Thus, Locke admittedly asked Calderon if he wanted to empty his locker. First, Locke need not have extended that courtesy to Calderon. He could have simply asked him to leave when he gave him the letter outside the bakery. Further, Locke and Cassone need not have followed him to his locker. Calderon accepted Locke's invitation to clear out his locker and could have done so without Locke and Cassone following him. Instead, Locke chose to accompany him. Thus, all of the above was done at Locke's invitation and desire to follow Calderon and Aguilar. None of it was the idea of Calderon or Aguilar.

Locke and Cassone were led to a locker, which Calderon identified as his. On reflection, Locke did not believe him and then complained to Mary Lou Cassone that he was led to the wrong locker and was lied to by Aguilar who told him that they shared a locker. Locke's testimony is contradicted by Mary Lou Cassone who testified that Calderon told him that they shared a locker. This minor incident can hardly be seen as a reason to suspend Aguilar indefinitely. Moreover, when the investigation was concluded only 3 days later when no one admitted knowledge of the occupant of the locker, the suspension was not lifted and Aguilar was not asked to return to work.

Thus, the reason for the investigation, the identity of the occupant of the locker Calderon led them to was resolved within days of the investigation. As to Aguilar's alleged lie that he shared the locker with Calderon, Aguilar and Calderon denied saying that, and Mary Lou Cassone admittedly learned "that night"—the night of the incident, that Aguilar's locker was on the first floor, and not in the downstairs locker room, and that he did not share a locker with Calderon. Thus, the "investigation" was concluded at most 3 days after it began. The fact that the suspension was not lifted upon the conclusion of the investigation adds support to a finding that the suspension itself was motivated for discriminatory reasons. I accordingly find that the Respondent violated the Act in its indefinite suspension of Aguilar.

b. The discharge

Employee Marcelino Cortes had been a union supporter and a member of the organizing committee, but had a change of heart. He testified that on December 15 he told Rocky Cassone that he met with Calderon and Aguilar and told them that he no longer wanted to be a member of the committee, mainly because he was a new employee and did not want his name to appear in the flyer which set forth the names of the committee members. They insisted that he remain on the committee and Cortes refused. Cortes told Cassone that Aguilar said that he would break his bones and stab him if he withdrew from the committee.

Cassone suggested that Cortes make a police report. Cortes refused, but said that if they bothered him again, he would contact the police. The following day, Cortes decided to make a police report and asked Cassone to accompany him to the police station.

At hearing, Aguilar denied threatening Cortes, but admitted telling him that if he was determined to leave the committee, he should not tell any of the other members. The discussion was loud and Aguilar was admittedly angry that Cortes was withdrawing from the committee.

Rocky Cassone decided to discharge Aguilar based on Cortes' recitation of the threats. He did not interview Aguilar or Calderon concerning Cortes' allegations. He did not contact Calderon because he was no longer an employee, and he believed that Calderon would not tell him the truth. He did not interview Aguilar because he did not believe that he would tell the truth about the incident.

On December 18, Rocky Cassone called the police and asked if there was an outstanding warrant for the arrest of Calderon and Aguilar, and if so, they were standing outside the Respondent's premises. Shortly thereafter, two police cars arrived, and both men were arrested and handcuffed with 15 to 25 employees watching. Two days later, on December 20, Aguilar was discharged by a letter given to him that day. The election was held the following day.

As set forth above, Aguilar was a known early and leading supporter of the Union. He had been unlawfully suspended about 1 month prior to his discharge, and denied threatening Cortes. As set forth above and below, an ample record of the Respondent's commission of unfair labor practices has been established. Aguilar's discharge 1 day before the election in which he was to be the Union's observer leads me to find that a strong prima facie case has been established.

Although it is clear that Cortes reported the threats to Rocky Cassone, and Cassone acted on the report in discharging Aguilar, the question here is whether the Respondent has met its *Wright Line* burden of proving that it would have discharged Aguilar even in the absence of his union activities. I find that it has not met its burden.

First, the Respondent deviated from its policy of investigating confrontations between its employees and between employees and supervisors by interviewing the participants. In this connection, Locke, Rocky, and Mary Lou Cassone testified that they interviewed Moises Contrares and Rafael Cardenas regarding a shouting match between them in which no blows were exchanged. I am aware that in the physical attack by Concepcion of Abraham, Locke determined that he did not have to

interview Concepcion because the weight of the evidence, including eyewitnesses, satisfied him that Concepcion struck Abraham. Here, there were no independent witnesses to the alleged threats by Aguilar.

Respondent acted inconsistently in engaging in an extensive interview process in which the top three management officials spoke to both Contrares and Cardenas regarding an incident apparently involving, at most, verbal abuse, while the more serious allegation of verbal threats of physical harm made by Aguilar was not as thoroughly investigated since Aguilar was not spoken to. It is clear that an impartial inquiry would have included giving Aguilar the opportunity to present his account of the event. "An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the Respondent's motive was unlawful." *Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003). *Detroit Newspapers*, 342 NLRB 1268, 1272 (2004).

In addition, the circumstances surrounding Aguilar's discharge strongly suggests that it was discriminatorily motivated. It was preceded by Rocky Cassone's effectively causing his arrest by calling the police and inquiring whether an arrest warrant was outstanding and directing them to Aguilar's location. In addition, as discussed below, notwithstanding a court order permitting Aguilar to be on the Respondent's premises "at all times" on the day of the election, the Respondent refused to permit him to remain on the premises to act as the Union's designated observer.

Based on the above, I find that the Respondent has not met its Wright Line burden of proving that it would have discharged Aguilar even in the absence of his union activities.

3. Cabrilio Flores

a. The suspension

Flores testified that on February 4, 2000, he punched out of work, and then returned 20 minutes later and took three loaves of bread. Supervisor Aurelio Viegas stopped him and said that he could not take three loaves, and that he was "causing too many problems." Flores offered to pay for the bread, but this was refused by Viegas, with the remark "ask the Union for bread." Flores left the bread and departed.

Viegas testified that he told Flores that he should have asked permission to take the bread, and in any event, his action was improper because he had already left the plant three hours before. Viegas stated that Flores told him to eat the bread, and that when he (Viegas) died, he would take everything with him. Viegas was upset at those remarks and told Rocky Cassone what Flores said. Viegas testified that it is the Respondent's practice to permit employees to take bread home daily, however, they are limited to two loaves of bread. Flores denied being told by Viegas at the time that he could take two loaves. Viegas denied mentioning the Union in their conversation.

Viegas further testified that he saw Flores leave the facility with a package of bread when his shift ended at 6 or 6:30 p.m. on February 4, and saw him return hours later, at about 10 p.m., taking another three loaves. Viegas believed that Flores had no reason to return to the plant after he left and spoke to him about the additional bread he took. Viegas' version is not supported by the Respondent's payroll records which state that Flores arrived at 8:54 a.m. on February 4, then left for 6 minutes from 3:49 p.m. to 4:05 p.m., and then punched out at 8:23 p.m. He was credited with having worked 10.98 hours that day. That corroborates Flores' testimony that he clocked out at about 8:30 p.m.

In this regard, Viegas' testimony about when he saw Flores leave, and the reason he stopped Flores is contradicted by the Respondent's records. He could not have seen Flores leave earlier with a package of bread because his shift did not end at 6 or 6:30 p.m. Further, Flores did not return hours after ending his shift because he left the facility at 8:30, the conclusion of his shift. Thus, Viegas' reason for stopping and questioning Flores was untrue.

On February 8, Flores received a 3-day suspension. The suspension letter stated that when Viegas asked him what he was doing, "instead of answering his question, you questioned why he was asking you and also became belligerent." The letter also stated that this was the second incident of insubordination, the first occurring 3 weeks before, on January 11, in which he answered leadman Serra in an "incorrect way." The suspension letter noted that this was the second time he had been "disrespectful and belligerent toward your superior."

The Respondent argues that Flores was not suspended because he took more bread than he should have, but because of his response to Viegas. In this connection, inasmuch as Flores suffered no disciplinary action for attempting to take the bread, I find that by telling Flores that he could not take any bread that day, the Respondent denied him a benefit which it permitted other employees to have. That violated Section 8(a)(1) of the Act.

Locke testified that the Respondent's policy permits employees to take one loaf of bread with them, and that most employees take bread when they leave work. However, Viegas told him that Flores took three to five loaves, and became agitated, and asked why he was being stopped and questioned, and who was Viegas to question Flores.

As set forth above, Flores' name was listed as a committee member on the letter received by the Respondent in November 1999. At the time of the confrontation, Viegas knew that Flores supported the Union. Thus, Viegas, who was aware of Flores' union support, exaggerated to Locke the number of loaves taken by Flores, telling him that Flores took three to five loaves.

I find that the Respondent has not met its *Wright Line* burden of proving that it would have suspended Flores even in the absence of his union activities. Its main witness, Viegas, justified his questioning of Flores on the basis that he had seen Flores leaving earlier at the end of his shift with bread, and then saw him return 3 hours later to take more bread. Viegas' basis for questioning Flores was proven false by the Respondent's records which showed that Flores left the plant only once that evening. A fair inference may be made that Viegas, knowing that Flores was a union supporter, gave this false testimony to support his reason for stopping him because he saw him taking three loaves of bread and sought to make an issue of that. This inference is further supported by Flores' believable testimony that when he offered to pay for the bread, Viegas told him to have the Union give him bread. Viegas also exaggerated to Locke the number of loaves that Flores took, telling him that he took three to five loaves whereas Flores took only three.

It even appears that Viegas exaggerated what Flores told him. Thus, Locke's testimony and the suspension letter stated that Flores became belligerent and questioned why he was stopped and questioned. No mention was made about Flores' alleged comments that Viegas should eat the bread, and that Viegas would take everything with him when he died. How-

ever, even assuming that Flores answered in that manner, it is understandable that he would have been surprised by being questioned about taking bread when it is permissible for workers to do so, and therefore reasonably questioned Viegas about why he was stopping and questioning him.

Accordingly, I find that the suspension of Flores violated Section 8(a)(3) and (1) of the Act.

b. The discharge

The purpose of a wall-mounted fan near Flores' workstation at the oven is to blow air onto the moist bread so that it is dry before it is placed in the oven. According to Flores, it is used generally for Italian garlic bread, but occasionally it is used to dry rolls. According to manager Anthony Sena, the temperature in that area is 100 to 120 degrees when this incident occurred on September 3, 2000. Flores testified that after the bread was dried and after it was baked, other employees turned the fan so that it was directed at the employees.

Flores testified that in about August 2000 Sena asked him who moved the fan. Flores replied that he did not know. Sena answered that he was told that Flores moved it, and the next time he moved it he would be fired. About 2 weeks later, in September 2000, Sena approached the area where Flores and Oscar Bonilla worked. Apparently, Sena was told that Flores moved the fan. He told Flores in English that he told him not to move the fan, called him a "mother f–ker" and "idiot" and said "get out, get out of here, leave." Sena said nothing to Bonilla. Flores immediately punched out and left the building. This conversation was in English, but Sena acknowledged that Flores does not understand much English.

Sena testified that the fan is supposed to be pointed at the bread and not the workers, and that the fan was broken by the workers who constantly turned and twisted it. On the night at issue, Sena told Flores that the fan was turned, that he was told that Flores turned the fan the prior week, and that if he learned that he turned the fan again that night he would recommend that Flores be fired. With that, Flores said that he did not need this and was leaving. As Flores began to leave, Sena told leadman Guillermo Serra to tell Flores in Spanish that he did not ask him to leave or tell him he was fired. Serra told him that, but Flores said that he was leaving, and left. Sena denied cursing Flores or telling him to leave. Sena's statement written that evening is consistent with his testimony. Flores testified that Serra saw him leave, but apparently denies any conversation with him in which Sena told him that he was not being fired.

Flores was not scheduled to work the following 2 days, and within the next couple of days he went to the facility and spoke to Mary Lou Cassone and Locke. Through a translator, Locke asked Flores why he left work and "abandoned" his job. Flores said that Sena insulted and cursed him and told him to leave. He testified that Mary Lou Cassone told him that he was a liar who liked to play games. They called Sena, but he did not join the group. Rather, Serra came to speak to them. Serra told those present that Sena did not fire Flores. Locke and Mary Lou Cassone then told Flores that there was no more work for him, and Flores left.

Mary Lou Cassone testified that at their meeting Flores told her that he left because Sena told him to leave, and asked her for permission to return to work. She told him "you left your work. That was it." Interestingly, Locke, who was present at the discussion, denied that Flores said that he wanted to return to work.

As set forth above, Flores' name was on the list of union committee members received by the Respondent in November, 1999. His status as an open union supporter, combined with the unfair labor practices I have found above and below, leads me to find that his discharge was motivated by the Respondent's animus toward the Union.

The Respondent argues that it did not discharge Flores, but that he quit. Flores stated that he was fired. Sena recognized that there was a language problem, and according to him, used Serra to tell Flores that he was not fired. However, the immediate impression given to Flores was that he was fired, and that is why he began to leave. Only then, according to Sena, did he seek to enlist Serra to translate his warning to Flores.

The weakness of the Respondent's argument is seen in Flores' visit to the facility at most 1 day after he was scheduled to return to work, and his request that he be permitted to return to work. Rather than acknowledge that an interpretation problem was at the heart of the conversation between Sena and Flores, the Respondent refused to permit him to return to work, saying that he had abandoned his job. I conclude that this was a convenient opportunity for the Respondent to rid itself of a known union supporter who had been employed for nearly three years, and except for the unlawful suspension and this incident, received no other discipline. I accordingly find and conclude that the Respondent has not met its *Wright Line* burden of proving that it would have discharged Flores even in the absence of his union activities.

4. The discharge of Jose Mario Castro

Jose Mario Castro, a cleaning department worker, testified that he signed a card for the Union in the downstairs cafeteria, and joined the Union's organizing committee on about September 17.

Castro was a long-term employee, being employed about 6-1/2 years, from November 1993 until his discharge on April 4, 2000. He was a member of the Union's organizing committee and served as the Union's replacement election observer. Castro worked as a cleaning employee in the sanitation department 10 hours per day during the week, and 9 hours on Saturdays. His supervisor was William Cranisky, the director of sanitation, who was in charge of about 20 employees who cleaned the equipment and the building.

The Respondent's written records establish that on October 6, 1998, Castro was suspended for 3 days for being absent from work on September 30, and not calling in. The letter included a warning that excessive absenteeism or tardiness will result in discipline up to and including discharge. He was also suspended for 3 days in January 1999 for leaving his work area unclean. In September 1999 he was warned for not coming to work after telling Cranisky that he would be at work after a class he was taking. He was warned at that time that if he failed to come to work when scheduled he would be terminated. On October 5, 1999, Castro was suspended for 1 week and given a final warning for speaking for one hour to a worker while both were on working time.

Cranisky testified that during the 1-1/2 months before Castro's discharge, he warned him several times about his lateness, telling him that if he did not arrive at work on time he would be fired. However, there was no evidence that any of those warnings were in writing.

Castro did not work on Sunday, April 2, 2000, because of pain in his back. He testified that he called Supervisor Cranisky

that morning, told him of his condition, and asked for and received permission to be absent from work that day. In addition, Castro told his neighbor and coworker Alejandro Ponce to tell Cranisky that day that he would not be at work. Ponce reported to Castro later that he gave the message to Cranisky. Cranisky denied that Castro called, and Ponce did not testify.

The following day, April 3, when Castro punched his time card at 5 a.m., Cranisky gave him the following letter and told him to go home:

> Although your scheduled starting time is 5:00 a.m. you have been consistently coming in at various times to suit yourself, sometimes as late as one and one-half hours late. You have been warned of this in the past on more than one occasion. You have received numerous written warnings regarding your failure to follow the bakery's rules and regulations and that the consequences would be immediate termination. Therefore your employment with J.J. Cassone Bakery is terminated effective immediately.

Cranisky testified that Castro did not report to work on April 2 and did not call. Although that was the "straw that broke the camel's back," he had a history of coming in late, although Cranisky conceded that on the day he was discharged he arrived at his regular starting time of 5 a.m.

Cranisky testified that leading up to his decision to discharge Castro, he considered (a) Castro's history of lateness, (b) the several disciplinary letters he received, (c) his review of his time records for the 1-1/2 months prior to the discharge which indicated that he was late 25 times, and in 11 of those instances he was late more than 30 minutes, and (d) his failure to come to work on April 2 or call.

Cranisky stated that Castro was fired for excessive lateness and for the three suspensions prior to his discharge. Cranisky noted that if Castro did not have a poor lateness record he would still be employed if he did not receive any later suspensions. He further noted that Castro's lateness record was the worst of any worker in the sanitation department.

Cranisky further stated that if an employee is excessively late or absent he issues a verbal warning first. If the attendance problem continues without improvement, he issues a written warning and then a suspension. There are no specific number of times an employee must be late before discipline is imposed. He looks at the employee's entire record for a fixed period of time, for example, 2 to 3 weeks, before making a decision based on his lateness record. He then tells the employee that there appears to be a "pattern," meaning that he had been late three times in the past one or 2 weeks and wants to see an improvement. If there is no improvement, a written warning is issued.

Cranisky testified about the attendance records of certain employees in his department. The starting time for Gustavo Cardenas and Victor Flores was 5 a.m. According to the Respondent's records for 2000, they were late 7 consecutive days from January 9 to 15, but received no discipline for such lateness. Cranisky explained that since Flores did not have a particular area which must be cleaned for the following day, and did not have to complete his work by 4 p.m., he did not have to arrive on time, and instead could stay at work later. Also, Cardenas could start later because he was the clerk and drove trailers. In contrast, according to Cranisky, Castro was required to be at work at 5 a.m. when the production line was finished, so he could clean it before the afternoon start-up of the line. I note, however, that his 25 latenesses for such an important function did not cause Cranisky to act earlier to discharge him. I believe that it is also significant that neither Cardenas nor Flores was a member of the Union's organizing committee.

A further review of the records of employees in the sanitation department reveals that, assuming that "L" stands for lateness, and that a prearranged later starting time does not apply to them, other employees were consistently late during the period January 9 through February 5. Thus, Benjamin Barajas was late each day in each of those weeks except for the week ending January 31, in which the payroll record page for him and three others was not included in the hearing record. Cardenas was also late each day from January 9 through February 5. Feliz Salvador was late 7 days per week in the weeks ending January 15 and 29, and February 5. Miguel Morel was late 7 days during the week ending January 15, 6 days during the week ending January 22, and 4 days during the week ending February 5.

While the records of these employees are not as bad as that of Castro, it is clear that other sanitation department employees were frequently late and apparently received no discipline.

As set forth above, Castro was a prominent supporter of the Union as a member of the organizing committee and as its replacement observer in the December 1999 election, he was the "face" of the Union. Based upon these factors and my findings herein that the Respondent bore animus toward the Union, I find that his discharge was motivated by his activities in behalf of the Union.

The last written disciplinary action taken against Castro was in October 1999, 6 months prior to his discharge. Notwithstanding that Castro was late numerous times in the 1-1/2 months prior to his firing, and assuming that he was verbally warned he was not given a written warning or a suspension for any of those latenesses. This is contrary to Cranisky's practice in which if the lateness problem continues without improvement, he issues a written warning followed by a suspension. It is also important to note that the letter discharging him did not mention his alleged failure to call in the day before.

Notwithstanding Castro's history of lateness, and the critical importance Cranisky placed on his being at work on time, he permitted Castro's lateness to continue. Cranisky's explanation as to why Cardenas and Flores were permitted to be late is unconvincing. Similarly unconvincing was his testimony that although he examined the computerized time records to determine who was late, he did not understand that the letter "L" stood for lateness, even though he identified employees as being late on days that their records listed "L" after their time of arrival.

In addition, the Respondent notes that 11 other employees were disciplined for frequent lateness and unexcused absences in the past 4 years. A careful review of those records, however, shows that they were only warned or suspended for such conduct and not discharged: Louis Torres—warning for being absent 1 day; Rosa Soto - warning for being absent 9 days without a doctor's note; Antonio Lopez—warning for absence and failure to call or bring a doctor's note for one absence; Elard Chavel—3-day suspension for being late seven times in 12 days; Juan Chavez - failure to return to work after a suspension treated as a voluntary quit; Jacob Mathai—1-week suspension for repeated absences; Rigoberto Mouray—warning for failure to report to work or call; Jon Cassone—warning for absence or lateness; Jose Chavez—discharge for failure to report to office to inform the Respondent as to why he was not at work (This

was not a discharge for absenteeism, but a discharge for not informing the Respondent as to why he was not at work); Joseph Bobin—warning for being absent 8 days from February to July; Jose Manglavil—warning for being absent on two Sundays.[6]

Only one employee, Juana Rivera, was discharged for being absent. That was for an absence on Mother's Day, but her offense was also listed as insubordination in that she was told she had to work that day or she would be terminated to which her response was a "shrug" and a reply that she would not be at work.[7] Accordingly, it cannot be said that she was discharged solely for absenteeism. Rather, her discharge was prompted by an insubordinate refusal to come to work when directed to do so.

It thus cannot be found that the Respondent had a consistent policy of discharging employees for latenesses. I therefore find and conclude that the Respondent has not met its *Wright Line* burden of proving that it would have discharged Castro even in the absence of his union activities.

5. The discharge of Lorenzo Macua

Macua began work in the production department in March 1999 under Supervisor Tony Venegas. He was a member of the Union's organizing committee and testified that he gave about 18 authorization cards to coworkers outside the facility.

In September 1999, Macua's shoulder was injured on the job when a forklift truck hit him. He continued to work for 2 months, but in November left work for about 1 month and returned in December. A doctor's note dated April 26, 2000, was given to the Respondent which stated that Macua was being treated for a left shoulder injury and should not lift over 10 pounds with his left arm. Mary Lou Cassone stated that when she received this note Macua was given light duty work, but Macua denied being given such work.

Macua testified that on Friday, June 30, 2000, he visited his physician and was given a note requesting that he be given light-duty work. He arrived late to work that evening and gave Venegas the note, but was not given lighter work. That evening, about halfway into his shift, he told Venegas that he was in pain and could not work. Venegas told him he must continue to work. Macua refused, and left work.

Macua testified that on the following day, July 1, he phoned the Respondent and told secretary Marta that he would not be at work due to the pain he was experiencing. Marta told him to bring a doctor's note. He did not report to work on Sunday, July 2, and did not call because the office was closed. On Monday, July 3, Macua did not work, but called the facility and told Mary Lou Cassone that he could not report to work because he had a doctor's appointment. Mary Lou Cassone replied that he must work, and he must bring a physician's note. Macua was not scheduled to work on July 4, and the office was closed. Mary Lou Cassone testified, denying that Macua spoke to her on July 3, although she conceded that she may have been at the facility that day.

Macau further stated that he did not work on July 5, but visited the doctor and gave the doctor's note that day to Mary Lou Cassone. The note said that Macua was receiving physical therapy three times a week, was "totally disabled and may not return to work until further notice." Mary Lou Cassone told him that he was absent from work on July 1, 2 and 3, and did not call or bring a doctor's note. She said that she wanted to call his physician to see if he visited the doctor on June 30, and then told him that he had no work at the facility.

Mary Lou Cassone testified that the Respondent's absence policy requires that the employee must be at work on time. The company tries to "work with" employees who begin to be absent, and warns them that if such absences become "habitual" they will be suspended, and that further absences may result in termination. The steps in such discipline are a verbal warning, written warning and termination. However, there are no set number of absences which trigger any of the disciplinary steps.

Mary Lou Cassone stated that she received a report from Tony Sena in June, 2000, that Macua did not report to work on June 18, 19, or 20, and did not call. Macua came to the facility on his day off on Friday, June 21, where Mary Lou Cassone told him that he must call in before his scheduled worktime if he did not intend to work, and if he did failed to do so he would be suspended or discharged. She also told him that a doctor's note was required so that his illness could be verified. Macua testified that he worked on June 17–21 and was paid for those days. The payroll records, however, show that he was absent on those days and was not paid.

Mary Lou Cassone further testified that Macua arrived late to work on June 30. She knew that he had visited the physician on June 27, but did not know that he also had an appointment on June 30. Macua was absent and, according to her, did not call in on July 1 through July 4. He brought a doctor's note on July 5, referred to above, which said that he was unable to work. Mary Lou Cassone told him that the note was too late, in that she had already warned him that he must call before his shift started if he would not be at work, and since he had not done so he was fired. This testimony is inconsistent with her other testimony that if an employee is absent and does not call in or bring a doctor's note "I'm very lenient. I try to work with people. I talk to people. Sometimes we get young kids, and we try to straighten them out and see if we can get them to grow up and come to work like an adult; and some of the adults you have to treat like that. But we will get on them if they continue."

Mary Lou Cassone stated that she was aware that Macua continued to suffer from a work-injury sustained in September 1999. Nevertheless, he failed in his obligation to call if he intended to be absent. She also noted that notwithstanding his injury, he worked a substantial amount of time after the accident, and worked on the same day that he received physical therapy.

Based on the above, it appears that Macua, despite his injury and accompanying pain, continued to work until he was pronounced totally disabled and unable to work on July 5. Accordingly, it does not appear likely that a person who continued to experience pain but nevertheless worked 6 days per week, sometimes in excess of 60 hours per week, would fail in his obligation to call if he did not expect to work. His testimony is consistent that he did call when he was going to be absent from work, and when told on July 1 and July 3 to bring in a physician's note, he did just that at the first opportunity to do so—when he returned to the facility for the first time on July 5. It is clear to me that Macua did call to report his intended absences on July 1 and 3. On both such dates he was told to bring a doctor's note and he did so on July 5. Accordingly, a fair inference may be made that he must have called on July 1 and 3 since he was instructed on each occasion to bring a physician's note, and

[6] See R. Exhs. 44–71.
[7] R. Exh. 45.

he followed that directive.

Accordingly, I find that Macua engaged in open union activities by being a member of the Union's organizing committee whose name was on the list provided to the Respondent, and pursuant to my findings herein that Respondent bore animus toward the Union, I conclude that his discharge was motivated by his activities in behalf of the Union.

The Respondent argues that it disciplined other employees for being absent and failing to present a physician's note.[8] However, as set forth above with respect to Castro, it cannot be found that the Respondent had a consistent policy of discharging employees for absenteeism or failure to present physician's notes. I therefore find and conclude that the Respondent has not met its *Wright Line* burden of proving that it would have discharged Macua even in the absence of his union activities, and that his discharge violated Section 8(a)(3) and (1) of the Act.

The complaint alleges that Macua was also discharged in violation of Section 8(a)(4) because he gave testimony under the Act. Judge Edelman found that Macua's presence at the hearing on June 27, several days before his discharge, caused Mary Lou Cassone to discharge him. However, in the absence of statements or other evidence that Macau's presence at the hearing was related to his discharge, I cannot find that that was a motivating factor in Macua's discharge. I will accordingly dismiss the 8(a)(4) allegation of the complaint.

6. The suspension of Roberto Lostaunau

Lostaunau began work for the Respondent in November 1995. He was a member of the Union's organizing committee and his name was listed on the letter sent to the Respondent in November 1999 which listed all the committee members. He also spoke to his coworkers about the Union. He stated that in November 1999, Mary Cassone, in addressing a group of workers in order to persuade them to vote against the Union, told them of the many benefits the employees enjoyed. Lostaunau spoke out, remarking that if the workers had so many benefits, why was she "fearful" of the Union organizing them, adding that he was working 60 to 70 hours per week and earning $380 per week. She did not reply.

Lostaunau stated that he received a 10-minute break every 3 hours during which he went to the bathroom or drank a beverage. If he had to use the bathroom when he was not on a break, he would ask a coworker to briefly substitute for him on the oven. On March 25, 2000, Louis Castro a coworker who worked on the same oven as Lostaunau, left the machine and went to the bathroom, returning 10 minutes later. When he returned, Lostaunau went to the bathroom for 10 minutes. Coworker Indio took their places during their absences. Neither had permission to leave the machine, and both men left their workplaces while they were on worktime and not on a break.

Manager Locke testified that employee Jose Lemus told him that he saw an employee working in Lostaunau's position, and noticed Lostaunau in the lunchroom during a time when he did not have an official break. However, Lemus testified that he did not tell Locke that Lostaunau was in the cafeteria, at first testifying that he saw Lostaunau while he was on the break, and then stating that he did not see him. Lemus stated that he simply told Locke that Lostaunau took a break.

Locke met with Lostaunau with Lemus translating. Lostaunau testified that Locke immediately began yelling at him in English, which he did not understand, and Locke became angry. Lemus attempted to translate their conversation. Lostaunau also raised his voice, and raised his hands in a gesture which to him meant "stop, I don't understand," whereupon Locke continued yelling, raised his hand and said "get out." Locke asked for his timecard, which Lostaunau threw on the table, and left. Locke testified that Lostaunau raised his voice to him before Locke raised his voice. In fact, he stated that he began to ask him what the problem was when Lostaunau raised his voice.

Lostaunau did not report to work the following day, believing that he was fired, but returned shortly thereafter to ask Locke for a letter of termination. Lostaunau testified that Locke told him at that time that he was not discharged. Rather, he was upset because Lostaunau threw his card down and answered in the manner that he did. Locke said that he had to decide whether to discharge or suspend him. The next day he received a letter suspending him for 3 days. The letter noted that Lostaunau (a) took an unauthorized 15-minute break, (b) was not entitled to a break whenever he wanted one, and (c) was permitted to "quickly take a bathroom break, not a full break." When he suspended Lostaunau, Locke was aware that he was a union supporter.

Locke testified that employees are permitted to take bathroom breaks at any time as long as a coworker covers their position, which Lostaunau did. However, instead of just quickly going to the bathroom and returning, he was told by Lemus that Lostaunau was sitting in the lunchroom, and away from his work station for at least 15 minutes. Thus, Locke concluded that Lostaunau did not simply take a bathroom break—he took an unauthorized break. As set forth above, Lemus denied telling Locke that he saw Lostaunau in the lunchroom.

Locke stated that as soon as he began to speak, Lostaunau became very agitated, excited, belligerent, and began interrupting him in Spanish. Locke held up his hand and told Lemus to tell Lostaunau to stop talking, and that Locke would speak first and then Lostaunau could speak. Lemus was not able to translate that because Lostaunau's agitated behavior became worse and he spoke very loudly. Locke again raised his hand, asking Lostaunau to stop, but he did not. Locke told him to punch out and come in on Monday, whereupon Lostaunau threw his time card across the room and left.

Lemus first testified that Locke did not raise his voice at the beginning of their conversation, but later he did, adding that Locke raised his voice before Lostaunau did so, but also adding that Lostaunau interrupted Locke by speaking in Spanish, and did not permit Lemus to translate before he began speaking in Spanish. Lemus later testified, however, that Lostaunau spoke in a raised voice before Locke did. Lemus stated that the conversation was heated—"neither understood the other," and then Locke told Lostaunau to leave.

I find that Lostaunau was active in behalf of the Union and, alone among his coworkers, was outspoken to management in behalf of the workers prior to his suspension. Accordingly, I find, based on the findings of unfair labor practices above, that the Respondent bore animus toward the Union, and that his suspension was motivated by his activities in behalf of the Union.

The Respondent presented evidence that it has suspended other employees for belligerent or insubordinate conduct. However, based on the above facts, it is questionable whether Lostaunau took a permissible bathroom break, as he testified, or whether he took an extended break in the cafeteria, which is

[8] See fn. 6, above.

not. Lemus denied telling Locke that he saw Lostaunau in the cafeteria, and testified inconsistently as to whether he saw Lostaunau or not during the break. He was certain only that he saw another employee substituting for Lostaunau on the oven. It is clear that if Lemus did not tell Locke that he saw Lostaunau in the cafeteria, Locke could not have relied on that in suspending Lostaunau. Further, there is some confusion about whether Locke raised his voice first, as testified by Lostaunau and at first by Lemus, thereby prompting Lostaunau to raise his voice. These factors make the Respondent's reasons for suspending him suspicious. In any event, it is the Respondent's burden to prove that it would have suspended Lostaunau even in the absence of his union activities. Based on the above, I find that it has not met its *Wright Line* burden, and that Lostaunau's suspension violated Section 8(a)3) and (1) of the Act.

7. The discharge of Salvador Concepcion

Concepcion began work in 1997. He was a member of the Union's organizing committee, and spoke with employees during his break, giving out about four authorization cards for the Union. At the time of his discharge, he worked on a machine with Concepcion Herrera and Wilma Cassone.

Concepcion stated that on the day of his discharge on November 1, 1999, he gave an authorization card to coworker Concepcion Herrera. He first testified that Herrera returned the card to him in the locker room, but then stated that she gave it to him at their machine. Concepcion first testified that Supervisor Abraham saw him take the card from Herrera, but then stated that did not see the card's transfer. In a letter to the Regional Office, Concepcion stated that he was not sure and did not know if Abraham was able to see him handed the card, but later Abraham asked him if he was in the Union, and that because of such activity many employees had been fired "the last time." Abraham denied seeing Concepcion giving a card to Herrera, but did not deny seeing Concepcion receiving one from her. He also denied speaking to Concepcion about the Union.

Apparently at about that time, a dispute arose between coworkers Herrera and Wilma Cassone. Cassone arrived late that day. Her absence apparently caused some rolls to fall on the floor and Herrera was blamed by Abraham and asked to report to the office. Concepcion intervened, arguing that it was not Herrera's fault, but if anyone was at fault, he should be sent to the office also since he too worked on that machine. Abraham told him not to become involved in the dispute between the two women, what he was doing was "not right" and that "everyone that is involved in anything like that, I'm going to have to fire." Then Abraham told Viegas to tell Concepcion that he had to leave the plant in 5 minutes. Concepcion testified that he asked Abraham why he was being fired. Abraham replied that he was involved with the union, and if the Respondent learned that someone belonged to the Union he would be fired. Abraham also said that Concepcion was being discharged because he should not have become involved with defending the female employees, and also because he brought problems and had "illegal papers."

According to Concepcion, he then walked toward Abraham and thanked him for employing him, and Abraham cursed and then pushed him. Concepcion then pushed Abraham. Concepcion denied punching Abraham.

Abraham testified that Concepcion became angry and cursed him because Abraham told the two women to report to Mary Lou Cassone office. Abraham walked away from Concepcion and went to the drivers' room where he called Locke at home and told him of the situation. Locke told him to send Concepcion home and Abraham asked Viegas to transmit the message. After Viegas delivered the message, Concepcion entered the drivers' room and punched Abraham, who denied touching Concepcion before the assault. After Concepcion was restrained by other workers, he again charged at Abraham in an apparent attempt to hit him again. Concepcion was again restrained and the police were called.

Independent witness Dennis Scofield testified that he was loading his truck and heard Concepcion yelling and screaming. Scofield turned and saw Concepcion walking quickly to the drivers' room and striking Abraham in the head, describing it as a "good flat smack on the side of the face." He testified that he saw a red welt on Abraham's face after the assault. Scofield did not see Abraham push or strike Concepcion.

The evidence does not support a finding that Concepcion's discharge was motivated by his union activities. Even if it did, the evidence strongly supports a finding that the Respondent has met its *Wright Line* burden in discharging Concepcion. The evidence, especially the testimony of uninterested witness Scofield leaves no doubt that Concepcion struck supervisor Abraham without provocation or reason. I accordingly will recommend that this allegation be dismissed.

The complaint also alleges that Abraham unlawfully threatened Concepcion that if the Respondent learned that if an employee was a member of the Union, he would be discharged. In this connection, inasmuch as this statement was allegedly made as a part of the incident in which Concepcion was lawfully discharged, and as to which I have discredited Concepcion's testimony, I cannot find that Concepcion gave credible testimony as to the alleged threat. Since I find that Concepcion falsely stated that he did not strike Abraham, I cannot credit his testimony, which Abraham denied, that Abraham threatened him. I therefore will recommend that this allegation be dismissed.

G. The Representation Case

As set forth above, the Union filed its petition on November 2, 1999, a Stipulated Election Agreement was entered into, and an election was held on December 21, 1999, in which the Union was not selected as the employees' representative. The voting unit is as follows:

> All full-time and regular part-time packers, production workers, shipping and receiving employees, order-takers and fillers, maintenance employees, and sanitation employees employed by the Respondent at its 202 South Regent Street, Port Chester, New York facility but excluding all outside sales employees, drivers, office clerical employees, inside sales clerks, guards and supervisors as defined in the Act.

The Union filed 34 objections to the conduct of the election. Objections 2, 7, 8, 9, 10, 12, and 18 were withdrawn prior to or at the hearing. The objections before me include those which are also alleged as unfair labor practices and which have been discussed above, and also the following independent objections:

> Objection 1: The Employer designated Jon Cassone as its observer at the second and third sessions of the election. Mr. Cassone is a close relative of the Respondent's owners and is a supervisor and/or agent of the Respondent.

Objection 3: The Employer refused to allow Cesar Calderon, the Union's choice to act as its observer, to serve as an observer during the election.

Objection 4: The Employer refused to allow Adan Aguilar, the Union's choice to serve as an observer during the election.

Objection 5: A number of times during the course of the day of the election, the Employer, by its officers, agents and representatives called the local police and directed them to the Employer's facility and requested that they intervene in the NLRB election process. Employees witnessed members of the police force speaking with the Employer's representatives and interrogating the Union's officers and agents and Mr. Calderon and Mr. Aguilar.

Objection 6: A number of times during the course of the day of the election, the Employer requested that the local police intervene and prevent the Union's designated observers from participating in the election.

1. Objection 1

In *Peabody Engineering Co.,* 95 NLRB 952, 953 (1951), the Board stated that "it is well established Board policy that, in the interest of free elections, persons closely identified with the employer may not act as observers." The Board has also found that an individual who was not a statutory supervisor but was an agent of the employer could not function as the employer's election observer. *B-P Custom Building Products,* 251 NLRB 1337, 1338 (1980).

Here, I have found that Jon Cassone is an agent of the Respondent. His duties also require a finding that he is closely identified with the Respondent, and that employees view him as someone closely identified with the Respondent. Thus, many workers call him "supervisor," and Biermann turned over authorization cards to Cassone because he believed that he was a supervisor and manager.

In addition, Jon Cassone had the same last name as the owners of the facility, and is a second cousin of owners Rocky and Mary Lou Cassone. The Board has also held that close relatives of management of an employer are by their relationship "closely identified with the employer" and may not act as observers. *International Stamping Co.,* 97 NLRB 921, 922 (1951) (son and sister in law of the president); *Wiley Mfg.,* 93 NLRB 1600, 1601 (1951) (wife of the president). Although Jon Cassone is a more distant relative than the people involved in the two cited cases, he was nonetheless a relative who, it is reasonable to infer, was known as such by the voters.

Based on the above, I find that because Jon Cassone was an agent of the Respondent and a close relative of the owners of the Respondent, he was closely identified with the Respondent, and a free and fair election could not have been held because he acted as its observer.

2. Objections 3–6

There were morning, afternoon and evening voting sessions. Larry Atkins, the secretary-treasurer and business agent of the Union, arrived at the facility at about 8:30 a.m. for the morning session which was scheduled to begin at 9 a.m. Present were Aguilar and Calderon, the Union's designated observers. It was stipulated that Aguilar, Calderon and Alejandro Ponce were designated by the Union as its observers. Apparently, Calderon was to be the observer at the first session, Aguilar at the second, and Ponce at the third.

The following narrative of the events that took place before and during the election is not disputed. As Atkins, Aguilar, and Calderon approached the entrance to the bakery which led into the voting room, they were met by Respondent's attorney Marc Silverman, and Rocky Cassone. Silverman advised that Aguilar and Calderon were not permitted on the premises and must leave immediately because they were trespassing and were in violation of an order of protection obtained 2 weeks earlier. Atkins gave Silverman a copy of a modified order of protection obtained the previous evening, and requested that Calderon be permitted to serve as an observer. Silverman insisted that the two former employees were trespassing, and threatened to call the police if they did not leave. Atkins, Aguilar and Calderon did not enter the facility and waited outside the building.

The Board agents arrived shortly thereafter and Atkins, Aguilar and Calderon again approached the entrance. Mary Lou Cassone physically barred their entrance and Silverman told them that they could not enter the building, and again threatened to call the police. Rocky or Mary Lou Cassone then called the police, and two armed, uniformed police officers arrived in a marked police car between 8:45 and 8:55 a.m., parking 10 to 15 feet from the bakery entrance. Rocky Cassone told them that an order of protection prohibited Aguilar and Calderon from entering the premises. Atkins gave the officers the modified order.

The order of protection issued by State Court Judge Joseph A. Vita against Aguilar and Calderon based on a charge of "menacing in the third degree," ordered them to "stay away from" Marcelino Cortes, and/or from his place of employment, and also refrain from harassing, intimidating, threatening, or otherwise interfering with Cortes and the members of his family and household. They were also to refrain from any communication with Cortes by telephone or otherwise.

The modified order of protection was obtained after Atkins explained to Judge Vita that there was a pending "labor dispute" in which Aguilar and Calderon were designated as the Union's election observers. The modified order, issued by Judge Vita on December 20, 1999, the day before the election, stated: "Mr. Calderon and Mr. Aguilar are each permitted to be inside and in the vicinity of the *J.J. Cassone Bakery, Inc.*, 202 South Regent Street, Port Chester, New York, at all times during Monday, December 20, Tuesday, December 21, and Wednesday, December 22, 1999.

The police officers told Rocky Cassone that the modified order was valid. Atkins then asked Silverman to ask the Board agent to come outside to speak with them. Silverman refused, and told them to leave the premises. When Board Agent Will Perez came outside at about 8:55 a.m., Atkins told him that the Union had a modified order of protection, and that Calderon was designated as the observer for the morning session. He asked Perez to tell Silverman to permit them to enter the building. Perez told Silverman that discharged employees may act as observers. Calderon and Aguilar were not permitted entry, and Perez correctly told Atkins that he could not force the Respondent to permit access, and that he should file objections if necessary. The Union then asked Ponce to serve as the replacement observer for the first session. Atkins stated that he did not know whether Ponce, an evening-shift employee, could recognize alleged supervisors who worked in the morning but he reviewed certain names of alleged supervisors with Ponce.

The election began about 10 to 15 minutes late because of the discussion regarding whether Aguilar and Calderon would be permitted to act as observers, and the involvement of the

police. Aguilar and Calderon were permitted to vote.

According to Atkins, there was a "commotion" caused by the presence of the police. At the time of those discussions, about 15 employees congregated on the entrance steps, waiting to vote. Others stood at the loading platform and in the retail store area nearby.

Before the start of the second voting session, which was scheduled to begin at 1 p.m., the Respondent called the police, and Mary Lou and Rocky Cassone and Silverman were present at the entrance door with a uniformed police officer. When Atkins arrived at the facility with Aguilar and Calderon at about 12:55 p.m. the officer asked whether they were the "trespassers." Atkins replied that this matter was discussed earlier with the lieutenant. The officer said they would have to leave until the lieutenant arrived. Neither Aguilar nor Calderon were permitted to act as observers at the second session, and the Union appointed a replacement observer. The lieutenant and the officer spoke to Atkins at about 1 p.m., during which time employees were coming in and out of the facility in their presence.

Atkins was permitted entry to the voting room at each of the three sessions to participate in a pre-election conference and witness the sealing of the ballot box. Rocky Cassone testified that he refused to permit Aguilar and Calderon to serve as the Union's observers because they had threatened Cortes, were arrested the previous Saturday in front of the bakery, and he was afraid that Cortes, in coming to vote, would be face-to-face with them. He was concerned with the safety of Cortes and his other employees, and with the Respondent's liability if Aguilar and Calderon committed a violent act during the election. He stated that he was not concerned that their presence in the bakery would encourage support for the Union.

The Board has held that an employer has an obligation to permit a union to designate the observers of its choice, and that employees whose discharges are the subject of an unfair labor practice charge may act as the union's observers. *Kellwood Co.,* 299 NLRB 1026, 1029 (1990). Discharged employees Aguilar and Calderon were designated by the Union as its election observers. At the time of the election, charges were pending which alleged that their discharges were unlawful.

Nevertheless, the Respondent admittedly refused to permit them to act as the Union's observers. Its reasoning was that both men had been the subject of a criminal complaint charging them with menacing, it was aware that they had allegedly threatened employee Cortes with physical harm, and it feared for the safety of Cortes and others.

I might have been impressed with this argument if it had not been decided by Judge Vita, the same judge who first issued the order of protection requiring Aguilar and Calderon to stay away from Cortes and his place of employment, and later issued a modified order which permitted the two men to be inside the premises of the Respondent at all times on the day of the election. As set forth above, Union Agent Atkins explained to Judge Vita that they had been designated the Union's observers. Accordingly, the Respondent defied the court's order in prohibiting their entry into the facility to act as observers.

Thus, the Respondent decided, with no legal basis whatsoever, that it would not permit Aguilar and Calderon to act as observers. Judge Vita was certainly aware of the order of protection he granted, and on hearing that the employees sought entry to the facility for the limited purpose of acting as election observers, he granted that request. The Respondent could not lawfully prohibit them from entering the facility based on its own view that they would be a danger to their coworkers.

The barring of Aguilar and Calderon had a further adverse effect on the Union's right to have observers of its choosing. Apparently, the Union chose its observers from those who worked during the respective voting shifts.

Because the two men were prevented from acting as observers the Union was required to obtain a replacement observer at the last minute who was unfamiliar with the voters who did not work on his shift. Even though the Union was able to review the names of certain alleged supervisors with replacement observer Ponce, this must have been a hurried review and it was caused by the Respondent's actions in not permitting Aguilar and Calderon to act as the Union's observers.

I accordingly find and conclude that by preventing Aguilar and Calderon from acting as the Union's designated observers, the Respondent committed objectionable conduct.

Prior to the start of the first and second voting sessions, the Respondent called the police twice to report that Aguilar and Calderon were trespassing. The police responded both times and spoke to the officials of the Respondent and Union at the entrance to the voting room. They were in clear sight of employees who arrived to vote. The Board has held that as long as police officers do not "inject themselves into the election issues before the election . . . or speak to any of the voters during the election" their presence is not objectionable. *Vita Food Products,* 116 NLRB 1215, 1219 (1956). Here, there was no evidence that the police officers spoke to any voters.

However, I find that a combination of factors contribute to a finding that the presence of the police at the facility on the day of the election was objectionable. First, there was absolutely no reason for their presence. The Respondent called them to the scene because Aguilar and Calderon were allegedly trespassing but Judge Vita had, the day before, permitted their presence "inside and in the vicinity of" the facility that day. Accordingly, the Respondent had no legal basis to call the police. In fact, the responding officer told Rocky Cassone that the judge's modified order was valid. Second, the police were not at the facility on a general call. Their presence was clearly directed at Aguilar and Calderon, the two most active union supporters, and its designated observers. Employees scheduled to vote were able to see the police directing their attention toward Aguilar and Calderon—"are these the trespassers?" Third, the two men were arrested and handcuffed at the premises only 3 days before the election, again based on a call to the police made by Rocky Cassone.

The inescapable perception that employees viewing the scene immediately outside the voting room had was that police action was being taken involving Aguilar and Calderon. The fact that the voters did not see Aguilar and Calderon act as observers despite the fact that they were designated as such by the Union, and combined with their arrest at the bakery 3 days before the election, could only be viewed by the voters that the police were somehow involved in their failure to act as observers. On these grounds, I find that the police did "inject themselves into the election issues" whether by their own conduct or by being caused to inject themselves by the Respondent's conduct in calling them to the facility, and that their presence constituted objectionable conduct. *Vita Food Products,* above.

I further find that by calling the police to the facility on the day of the election with no legal basis, the Respondent committed objectionable conduct.

3. Conclusions as to the objections

Based on my findings above, I conclude that the unfair labor practices committed by Respondent during the critical period between the filing of the petition on November 2, 1999, and the election held on December 21, 1999, constituted objectionable conduct that interfered with the free choice of employees in the election. Such unfair labor practices include the suspensions and discharges of Adan Aguilar and Cesar Calderon, the two employees most active in the organization of the Respondent's employees, a threat that if the Union won the election, the employees' hours of work and other benefits would be reduced, threats of discharge, unlawful interrogation, loss of the employees' pension plan, announcement of a new benefit of monetary loans for emergencies, demands that its employees cease organizing for the Union, the creation among its employees of the impression that their union activities were under surveillance by the Respondent, informing its employees that their support for the Union would be futile, and threats of unspecified reprisals. Inasmuch as I have found that the discharge of Salvador Concepcion was not unlawful, I shall overrule Objection 14.

The Board has long held that it will set aside an election where one party engages in conduct which could have the reasonable effect of destroying the "laboratory conditions" necessary to ensure that employees have the opportunity to make an uninhibited choice on the question of representation. *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Conduct may be objectionable even where it does not rise to the level of an unfair labor practice. Conversely, conduct which violates the Act is, a fortiori, conduct which interferes with an election unless it is so de minimis that it is virtually impossible to conclude that the violation could have affected the results of the election. *Airstream, Inc.*, 304 NLRB 151, 152 (1991); *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786 (1962). The unfair labor practices found above, which occurred during the critical period could hardly be called de minimis.

Clearly, the Respondent's conduct warrants the setting aside of the election and the direction of a second election. *Mid-South Drywall Co.,* 339 NLRB 480 (2003). Therefore, I recommend that the election conducted on December 21, 1999, in Case 2–RC–22152 be set aside and a new election held.

CONCLUSIONS OF LAW

1. By suspending and discharging Cesar Calderon, Adan Aguilar, and Cabrilio Flores because of their activities in behalf of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

2. By discharging Jose Mario Castro and Lorenzo Macua because of their activities in behalf of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

3. By suspending Robert Lostaunau because of his activities in behalf of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. By threatening its employees with unspecified reprisals because of their support for the Union, the Respondent violated Section 8(a)(1) of the Act.

5. By interrogating its employees about their union activities and their support for the Union, and about the union activities and support of other employees, the Respondent violated Section 8(a)(1) of the Act.

6. By threatening its employees that they would lose their pension plan and would be discharged if the Union was successful in organizing its employees, the Respondent violated Section 8(a)(1) of the Act.

7. By demanding that its employees cease organizing for the Union, the Respondent violated Section 8(a)(1) of the Act.

8. By announcing a new benefit consisting of a policy of giving loans to employees for emergencies, and by denying benefits to employees, the Respondent violated Section 8(a)(1) of the Act.

9. By telling its employees that the Union would ask them for proof that they were legally authorized to work in the United States which would cause them to be discharged, the Respondent violated Section 8(a)(1) of the Act.

10. By threatening its employees that the Union would force the Respondent to reduce their workweek and threatening that they would lose other benefits if the Union won the election, the Respondent violated Section 8(a)(1) of the Act.

11. By creating the impression among its employees that their activities on behalf of the Union are under surveillance by the Respondent's representatives, the Respondent violated Section 8(a)(1) of the Act.

12. By informing its employees that it would be futile for them to support the Union, the Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

1. Cease and desist from

(a) Suspending and discharging its employees because of their membership in, support for, and/or their activities in behalf of the Union.

(b) Threatening its employees with unspecified reprisals because of their membership in, support for, and/or their activities in behalf of the Union.

(c) Interrogating its employees about their membership in, support for, and/or their activities in behalf of the Union, and interrogating them about other employees' union activities.

(d) Threatening its employees that they would lose their pension plan and would be discharged if the Union was successful in organizing its employees.

(e) Demanding that its employees cease organizing for the Union.

(f) Announcing a new benefit consisting of a policy of giving loans to employees for emergencies, and denying benefits to

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

employees in order to induce them to cease their support for the Union.

(g) Telling its employees that the Union would ask them for proof that they were legally authorized to work in the United States which would cause them to be discharged.

(h) Threatening its employees that the Union would force the Respondent to reduce their work week and threatening that they would lose other benefits if the Union won the election.

(i) Creating the impression among its employees that their activities on behalf of the Union are under surveillance by the Respondent's representatives.

(j) Informing its employees that it would be futile for them to support the Union.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Cesar Calderon, Adan Aguilar, Cabrilio Flores, Jose Mario Castro, Lorenzo Macua, and Roberto Lostaunau full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Cesar Calderon, Adan Aguilar, Cabrilio Flores, Jose Mario Castro, Lorenzo Macua, and Roberto Lostaunau whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Port Chester, New York, copies of the attached notice in English and Spanish, marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

(h) IT IS FURTHER ORDERED that Case 2–RC–22152 is severed from the consolidated complaint cases, that the election conducted therein is set aside, and that Case 2–RC–22152 is remanded to the Regional Director for Region 2 to conduct a second election. A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the Bakery, Confectionary and Tobacco Workers' Union, Local 3. To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. February 22, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or discharge you because of your membership in, support for, and/or activities in behalf of Bakery, Confectionary and Tobacco Workers' Union, Local 3 (Union).

WE WILL NOT threaten you with unspecified reprisals because of your membership in, support for, and/or activities in behalf of the Union.

WE WILL NOT question you about your membership in, support for, and/or activities in behalf of the Union, and WE WILL NOT question you about other employees' union membership or activities.

WE WILL NOT threaten you that you would lose your pension plan and would be discharged if the Union was successful in organizing you.

WE WILL NOT demand that you cease organizing for the Union.

WE WILL NOT announce a new benefit consisting of a policy of giving loans to you for emergencies, and WE WILL NOT deny existing benefits to you in order to induce you to cease your support for the Union.

WE WILL NOT tell you that the Union would ask you for proof that you are legally authorized to work in the United States which would cause you to be discharged.

WE WILL NOT threaten you that the Union would force us to reduce your hours of work and WE WILL NOT threaten that you would lose other benefits if the Union won the election.

WE WILL NOT create the impression among you that your activities on behalf of the Union are under surveillance by us.

WE WILL NOT tell you that it would be futile for you to support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Cesar Calderon, Adan Aguilar, Cabrilio Flores, Jose Mario Castro, Lorenzo Macua, and Roberto Lostaunau full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Cesar Calderon, Adan Aguilar, Cabrilio Flores, Jose Mario Castro, Lorenzo Macua, and Roberto Lostaunau whole for any loss of earnings and other benefits resulting from their suspension and/or discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Cesar Calderon, Adan Aguilar, Cabrilio Flores, Jose Mario Castro, Lorenzo Macua, and Roberto Lostaunau, and WE WILL, within 3 days thereafter notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

J.J. CASSONE BAKERY, INC.